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945  
No. 2583

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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DAN D. SUTHERLAND,

Plaintiff in Error,

vs.

F. W. PURDY,

Defendant in Error.

---

**Transcript of Record.**

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Upon Writ of Error to the United States District Court  
of the Territory of Alaska, Third Division.

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**Filed**

OCT 19 1915

**F. D. Monckton,**  
Clerk.



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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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DAN D. SUTHERLAND,

Plaintiff in Error,

vs.

F. W. PURDY,

Defendant in Error.  
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**Transcript of Record.**

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Upon Writ of Error to the United States District Court  
of the Territory of Alaska, Third Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**Names and Addresses of Attorneys of Record.**

*In the District Court for the Territory of Alaska,  
Third Division.*

Mr. E. E. RITCHIE, Valdez, Alaska,

Mr. O. A. TUCKER, Juneau, Alaska,

FRANK FOSTER, McCarthy, Alaska,

T. J. DONOHUE, Valdez, Alaska,

Attorneys for the Plaintiff *in* Plaintiff in  
Error.

MAURICE D. LEEHEY, 817 Alaska Bldg., Seattle,  
Wash.,

Attorney for the Defendant and Defendant  
in Error. [1\*]

---

*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Order [Permitting Plaintiff to File Amended  
Complaint, etc.].**

THIS MATTER coming on to be heard on motion  
of plaintiff for leave to file Amended Complaint, and  
the Court being fully advised in the premises,

IT IS HEREBY ORDERED that said plaintiff be,

---

\*Page-number appearing at foot of page of certified Transcript of  
Record.

and he hereby is permitted to file his Amended Complaint.

And pursuant to stipulation made in open court, IT IS FURTHER ORDERED that the Amended Answer of defendant now on file be, and the same is considered as the Answer to Plaintiff's Amended Complaint, and that all the allegations of Plaintiff's Amended Complaint be considered as being denied by the said Amended Answer.

Dated this 18th day of March, 1914.

FRED M. BROWN,  
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 18, 1914. Arthur Lang, Clerk.

Entered Court Journal No. C-2, page No. 172. [5]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Amended Complaint.**

COMES NOW the above-named plaintiff and in compliance with a recent decision of the above-named Court, and after leave of Court first had and obtained, files this, his Amended Complaint; and for

cause of complaint alleges as follows:

I.

That the plaintiff, Dan D. Sutherland, was at all the times hereinafter mentioned, qualified to locate mining claims in the Territory of Alaska, and to hold, own and possess the same; that Dan D. Sutherland and Dan Sutherland are one and the same person; that on August 30, 1913, said plaintiff located pursuant to the laws of the United States and the Territory of Alaska, a certain placer mining claim, known as and called the Surprise Fraction Mining claim, hereinafter more particularly described, and signed his name to the location notice, and located said claim as Dan Sutherland.

II.

That on the 30th day of August, 1913, said plaintiff went upon the unoccupied and unappropriated public domain in the Territory of Alaska, in the White River Mining and Recording District, at a point on Big Eldorado Creek, a tributary of Wilson Creek, which is a tributary of Chisana River, about one and one-half miles from the mouth of said Big Eldorado Creek, and located a certain placer mining claim on said Big Eldorado Creek between A. F. Nelson's No. 2 below discovery, and Richard Bell's No. 3 below discovery, embracing a tract of land 1300 feet up and down [6] said creek, and 330 feet on each side of the center stakes of said claim, and named and called said mining claim Surprise Fraction, bounded and described as follows, to wit:

Commencing at the Initial Stake, which is the upper center end stake and is placed at or near the



lower center end stake of A. F. Nelson's mining claim called No. 2 below discovery on Big Eldorado Creek, and running thence 330 feet northerly to stake No. 1; thence 1300 feet westerly to stake No. 2; thence 330 feet southerly to lower center end stake, which is at or near the upper center end stake of Richard Bell's No. 3 mining claim below discovery on said Big Eldorado Creek; thence 330 feet southerly to stake No. 3; thence 1300 feet easterly to stake No. 4; thence 330 feet northerly to place of beginning. And appropriated and claimed said placer mining claim by reason of said location and under and by virtue of the laws of the United States and of the Territory of Alaska.

### III.

That before making said location, to wit, on the 30th day of August, 1913, said plaintiff made a discovery of gold-bearing placer ground, carrying gold in workable quantities, at a point within the exterior boundaries of said Surprise Fraction mining claim as hereinabove described; that at the time of making said discovery he posted conspicuously at the point of discovery, a notice of location thereof containing (a) the name of the claim, to wit, Surprise Fraction Mining Claim; (b) the name of the locator, to wit, Dan Sutherland; (c) the date of discovery and posting of notice, to wit, the 30th day of August, 1913; (d) the number of feet in length and width claimed, to wit, 1300 feet long by 660 feet wide; and in all other respects complied with the laws of the United States and of the Territory of Alaska in regard to making discovery and posting notice of location.

That at the time of posting the notice of location he distinctly [7] marked the location on the ground so that its boundaries might be readily traced, by placing at each corner or angle thereof, substantial stakes or posts not less than three feet high above the ground and about three inches in diameter, and hewed on the side facing the claim. And each of said posts was marked with the name and number of the claim and the designation of the corner by number, and the corner post nearest the discovery monument was marked Corner No. 1, and the other corner posts were marked in regular rotation. This claim was located on open ground and the side lines were marked by stakes so as to readily lead from one corner to another of such claim, and in all respects the boundaries of said claim were marked as required by law; that within ninety days from the date of said discovery, and prior to the filing of the certificate of location, the said locator performed or caused to be performed, labor upon said claim in developing the same, in amount which was and is equivalent in the aggregate to One Hundred (\$100) Dollars' worth of such work, based on the going wages in the White River Recording Precinct, which said work constituted the location work as required by the laws of Alaska; that thereafter, within ninety days after discovery, to wit, on the 7th day of October, 1913, the locator caused to be recorded in the precinct wherein such claim is situated, a certificate of location, which certificate contained the name of the claim, the name of the locator, the date of discovery and posting of location notice, the number of feet in length and

width claimed, to wit, 1300 feet in length and 660 feet in width. Such certificate also set forth a description of the location of such claim with reference to natural and permanent monuments and well known mining claims, a description of the boundaries, corner posts and markings thereon, and a description of the location work and the place where the same was performed. Said certificate of location was verified by the plaintiff and locator before a [8] notary public authorized to administer oaths. Said certificate was filed for record on the 7th day of October, 1913, by Dan Sutherland, the plaintiff and locator, and recorded in volume 1, page 250, of the Records of the White River Recording Precinct, Territory of Alaska.

#### IV.

That said plaintiff did not during the calendar month of August, 1913, or during any other month in said year, locate or cause to be located in his name more than two mining claims in the Territory of Alaska.

#### V.

That the nature of plaintiff's estate in the land embraced in and covered by the said Surprise Fraction mining claim is that of owner of a legally located, unpatented placer mining claim; that the fee of said land still remains in the United States Government; that the said plaintiff is the owner of the said land and premises under and by virtue of his location and appropriation and the mining laws of the United States and the Territory of Alaska, and is entitled to the immediate possession of the



same and the whole thereof.

VI.

That plaintiff being in possession of the land embraced within the exterior boundaries of the said Surprise Fraction mining claim as aforesaid, the defendant on or about the 3d day of September, 1913, unlawfully and without right entered into the possession of said land and premises and ousted plaintiff therefrom and ever since has, and now does, wrongfully and unlawfully withhold the possession of said land and premises from this plaintiff to his damage in the sum of \$1,000.00; that the defendant ever since said date has acted as and claimed to be, the owner of the land and premises embraced within the exterior boundaries of the said Surprise Fraction mining claim as aforesaid [9]

WHEREFORE plaintiff prays judgment against the defendant for the restitution of and the possession of the above-described mining claim and premises and the whole thereof, and for damages in the sum of \$1,000.00 for the wrongful and unlawful withholding of the possession of said mining claim and premises from this plaintiff, and for his costs and disbursements in this action.

T. J. DONOHUE,

O. A. TUCKER,

Attorneys for Plaintiff.

United States of America,  
Territory of Alaska,—ss.

Dan D. Sutherland, being first duly sworn, deposes and says: I am the plaintiff named in the foregoing Amended Complaint; I have read the same and know

the contents thereof and the same is true as I verily believe.

DAN D. SUTHERLAND,

Subscribed and sworn to before me this 17th day of March, 1914.

[Notarial Seal]

O. A. TUCKER,

Notary Public for Alaska.

My commission expires July 28, 1917.

Service of the foregoing Amended Complaint is hereby acknowledged by receiving a copy thereof on the 17th day of March, 1914.

J. J. FINNEGAN,

Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Mar. 18, 1914. Arthur Lang, Clerk. [10]

---

*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Amended Answer.**

The defendant by order of Court herein entered, files his Amended Answer as follows:

**I.**

The defendant denies every allegation contained in

paragraph I of said complaint.

II.

The defendant denies every allegation contained in paragraph II of said complaint.

III.

The defendant denies every allegation contained in paragraph III of said complaint.

The defendant for a further answer, and as an affirmative defense to the cause of action stated in the complaint, alleges as follows:

I.

That at all the times stated in the complaint, and ever since July 6, 1913, the defendant was and now is the owner of and entitled to the possession, and during all of said time was and now is lawfully in the possession, by right of discovery and location in accordance with the law and local customs and regulations, of that certain placer mining location situated within the White River Precinct and Recording District of Alaska, designated as No. 2 Below Discovery on Eldorado Creek, a tributary of Wilson Creek, which latter creek flows into the Shushana River, [11] designated by the United States Geological Survey as the Chisana River; that said placer mining location was initiated by a valid discovery of placer gold made by one G. L. Gates as the agent and attorney in fact for and on behalf of this defendant; that said discovery was made on or about the last named date at a point now included within the limits of the placer claim herein named; that immediately after said discovery, and on the same day, the said Gates duly posted notice of such location on behalf

of this defendant, designating the claim as No. 2 Below Discovery on Eldorado Creek, and marked the boundaries thereof by proper stakes and monuments so that the same could be readily traced; that not more than two placer mining locations were made by or on behalf of this defendant within the Territory of Alaska during the said calendar month, or during any calendar month.

## II.

That this Court, by its order herein entered on May 7, 1913, created the White River Precinct and Recording District of Alaska, including therein the region wherein such location was made and where the ground in controversy in this action is situated; that a recorder was appointed for said district, but the exact location of the recording office therein was not designated; that the district so created included practically all of that portion of the Third Judicial Division of Alaska which lies north and east of the summit of the Alaska Range of mountains; that there are no towns whatever situated within said district, and no roads or established trails whatever into or across the same; that the region was wholly inaccessible after May 7, 1913, and during the summer months of said year, except by means of poling boats on the larger rivers, and thence across country, where no regular lines of travel or communication were established; that the said district is so situated that communication with its various parts is impossible except at irregular [12] intervals of weeks and months; that the recorder appointed for said district did not arrive therein, and no recording of-



fice was established therein, until on or about July 25, 1913; that no public notice was given as to where such recording office would be established or when the same would be opened, and neither this defendant nor his said attorney in fact had any knowledge thereof until on July 27th, 1913.

M. D. L.

III.

A. L. That said G. L. Gates was duly authorized to locate mining claims for this defendant and to do all acts necessary or deemed advisable to perfect the location and record of mining claims in the Territory of Alaska, which authority was contained in a power of attorney duly executed in writing and acknowledged by this defendant on May 31, 1913; that at all times herein stated this defendant resided outside the Territory of Alaska; that said power of attorney was delivered to the said Gates, who took the same with him upon a prospecting trip into the region included in the White River Precinct and Recording District of Alaska, with the intention in good faith of promptly recording the same there upon his arrival, but was prevented from doing so by the delay in the arrival of the recorder, and the consequent delay in establishing a recording office in said district; that it was impossible to record said power of attorney in any other recording office in the Third Recording Division of Alaska without making a trip involving great expense and the loss of at least two months' time during the most valuable season for prospecting, and the said Gates was dissuaded from attempting to record such power of attorney elsewhere by reason of the fact that such

recording district had been duly created, and a recorder duly appointed, and the said Gates had reason to believe and did believe that such recording office would be promptly established at some convenient place within said district; that said power of attorney was duly recorded by the said Gates at the earliest possible date, to wit, [13] on July 29, 1913, at page 280, in volume 1 of the Records of said White River Precinct and Recording District of Alaska.

#### IV.

That said Gates perfected the location of said placer mining claim designated as No. 2 Below Discovery on Eldorado Creek, and duly executed on behalf of this defendant and filed for record, a notice of location thereof in due form, and the same was duly recorded on July 27th, 1913, at page 31, in volume 1 of the mining records of the said White River Precinct and Recording District of Alaska.

#### V.

That on or about August 30th, 1913, the plaintiff, forcibly and unlawfully, and by threats of force and violence, entered upon a portion of the ground included in said Placer Location No. 2 Below Discovery on El Dorado Creek, then and now possessed and occupied by the defendant, and attempted to post thereon, and made a pretended posting thereon of an alleged notice of a placer location; that all the acts done by the plaintiff and in his behalf in connection with the pretended location of such alleged placer claim were done while trespassing upon the rights and property of the defendant, and over the protest of the defendant, and were accomplished by threats

of force and violence by the plaintiff and his agents and employees.

## VI.

That the said plaintiff made no discovery of mineral anywhere upon the ground included within the limits of his pretended location of said placer claim; that the said plaintiff did not post notice of such location in the manner required by law; that the said plaintiff did not mark the boundaries of such pretended location, or establish corners thereof, or otherwise indicate the limits of the same so that any such boundaries could be readily traced, and the pretended location by plaintiff of the placer mining claim described in his complaint was and is wholly void. [14]

WHEREFORE, The defendant, having fully answered, prays that plaintiff take nothing by his complaint, but that the defendant be decreed to be the owner and entitled to the possession of the placer mining claim designated as No. 2 Below Discovery on Eldorado Creek as herein described, and that defendant have judgment against plaintiff for costs.

MAURICE D. LEEHEY,

J. J. FINNEGAN,

Attorneys for Defendant.

United States of America,

Territory of Alaska,—ss.

Maurice D. Leehey, being duly sworn, says: That he is the attorney for the defendant F. W. Purdy in this action; that he has read the foregoing Amended Answer and knows the contents thereof; that the said defendant is at present absent from the Terri-

tory of Alaska, and for that reason this verification is made by affiant as his attorney; that affiant believes all the allegations in the foregoing answer to be true.

MAURICE D. LEEHEY.

Subscribed and sworn to before me this 14th day of March, A. D. 1914.

[Notarial Seal]

J. J. FINNEGAN,  
Notary Public.

My commission expires August 18, 1917.

A true copy.

MAURICE D. LEEHEY.

Service accepted March 16th, 1914.

T. H. FOSTER,  
Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska. Mar. 16, 1914. Arthur Lang, Clerk. By K. L. Monahan, Deputy. [15]

---

*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Motion [to Make Fourth Paragraph of Affirmative Answer in Amended Answer More Definite and Certain].**

COMES NOW the above-named plaintiff and



moves this Honorable Court for an Order requiring the defendant to make the fourth paragraph of his Affirmative Answer in his Amended Answer more definite and certain in this: That he set forth the exact date when the Notice of Location therein mentioned was recorded or filed for record. This Motion is particularly directed to the last three lines of said paragraph which read as follows: "was duly recorded on or about July 29th, 1913, at page 31 in volume 1 of the mining records of the said White River Precinct and Recording District of Alaska."

This Motion is based on the records of the White River Precinct and Recording District of Alaska, and particularly on the records on page 31 of volume 1 thereof, which shows the date of recording said Location Notice as follows: "Recorded by request of W. E. McKinney at 7 P. M. July 27, '13."

Dated this 16th day of March, 1914.

T. J. DONOHOE and  
O. A. TUCKER,  
Attorneys for Plaintiff.

Service of the foregoing Motion is hereby accepted.

MAURICE D. LEEHEY,  
Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Mar. 16, 1914. Arthur Lang, Clerk. [16].

*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Order [Granting Motion to Make Fourth Paragraph  
of Affirmative Answer in Amended Answer More  
Definite and Certain.]**

This matter coming on regularly to be heard on the motion of plaintiff for an Order of this Court requiring the defendant to make the fourth paragraph of his Affirmative Answer in his Amended Answer more definite and certain, in this: That the defendant be required to set out in said paragraph the day of the month and year on which he filed for record the Notice of Location of the mining claim therein mentioned. And the Court being fully advised in the premises,

IT IS ORDERED that said motion be granted and said defendant is ordered to amend said paragraph by interlineation by setting out the exact day on which said notice of location was filed for record with the recorder of the White River Recording Precinct of the Territory of Alaska.

FRED M. BROWN,

Judge.

Done in open court this 17th day of March, 1914.

To the foregoing ruling of the Court the defendant excepted and exception was allowed.

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Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Mar. 17, 1914. Arthur Lang, Clerk.

Entered Court Journal No. C-2, Page No. 168.  
[17]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Demurrer [to Amended Answer].**

COMES NOW the above-named plaintiff and demurs to defendant's Amended Answer as follows:

I.

Demurs to paragraphs I, II, III and IV of defendant's further answer and affirmative defense contained in the said Amended Answer, on the ground that said paragraphs do not state facts sufficient to constitute or make a cause of defense against plaintiff's Amended Complaint.

T. J. DONOHUE,

O. A. TUCKER,

Attorneys for Plaintiff.

Service of the foregoing Demurrer is hereby accepted this 18th day of March, 1914.

M. D. LEEHEY,

J. J. FINNEGAN,

Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Mar. 18, 1914. Arthur Lang, Clerk. By K. L. Monahan, Deputy.  
[18]

---

Special March 1914 Term—March 18th—14th Court Day, Wednesday.

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Minute Order Overruling Demurrer.**

Now, on this day, this matter came on to be heard upon plaintiff's demurrer to defendant's amended answer; T. J. Donohoe and O. A. Tucker appearing as attorneys for Dan D. Sutherland, plaintiff, and offering said demurrer, Maurice D. Leehey appearing as attorney for the defendant and after arguments had and the Court being fully advised in the premises.

IT IS ORDERED that said demurrer be and the same is hereby overruled, to which order and ruling of the Court plaintiff excepts and exception is allowed, and



IT IS FURTHER ORDERED that plaintiff have until March 31, 1914, in which to reply to defendant's amended answer.

Entered Court Journal No. C-2, Page 170. [19]

---

*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Reply.**

COMES NOW the above-named plaintiff and for Reply to defendant's further answer and affirmative defense admits, denies and alleges as follows:

I.

Referring to the first paragraph of said further answer and affirmative defense contained in defendant's amended answer, the plaintiff denies each and every allegation therein contained.

II.

Referring to the second paragraph of said further answer and affirmative defense contained in defendant's Amended Answer, the plaintiff admits the establishment of the White River Precinct and Recording District as therein alleged; and admits the appointment of a Recorder for said district, and denies each and every other allegation therein contained.

## III.

Referring to the third paragraph of said further Answer and affirmative defense contained in defendant's Amended Answer, the plaintiff denies each and every allegation therein contained.

## IV.

Referring to the fourth paragraph of said further Answer and affirmative defense contained in defendant's Amended Answer, the plaintiff denies each and every allegation therein contained.

## V.

Referring to the fifth and sixth paragraphs of said further answer and affirmative defense contained in defendant's Amended Answer, the plaintiff denies each and every allegation therein contained. [20]

WHEREFORE Plaintiff prays judgment in accordance with the prayer of his Amended Complaint.

T. J. DONOHOE and  
E. E. RITCHIE,  
Attorneys for Plaintiff.

United States of America,  
Territory of Alaska,—ss.

Dan D. Sutherland, being first duly sworn, deposes and says: That he is the plaintiff named in the foregoing Reply; that he has read said Reply and knows the contents thereof and the same is true as he verily believes.

DAN D. SUTHERLAND.

Subscribed and sworn to before me this 20th day of March, 1914.

[Notarial Seal]

GEO. J. LOVE,

Notary Public for Alaska.

My commission expires Nov. 25, 1914.

Service of the above and foregoing Reply is this day accepted by receiving a copy thereof.

MAURICE D. LEEHEY,

Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Mar. 28, 1914. Arthur Lang, Clerk. [21]

---

[Transcript of Testimony.]

*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

FRANK W. PURDY,

Defendant.

TRANSCRIPT OF RECORD.

BE IT REMEMBERED, That the above-entitled cause came on duly and regularly to be heard at Cordova, Alaska, on Tuesday, March 31, 1914, at 10 o'clock A. M., before the Honorable FRED. M. BROWN, Judge of said court, and a jury:

The plaintiff herein being represented by his attorneys and counsel T. J. Donohoe, Esq.; E. E. Ritchie, Esq., and O. A. Tucker, Esq.:

The defendant herein being represented by his attorneys and counsel Maurice D. Leehey, Esq., and J. J. Finnegan, Esq.:

Opening statements were made to the Court and jury on behalf of the plaintiff by Mr. Donohoe and on behalf of the defendant by Mr. Leehey:

WHEREUPON the following additional proceedings were had and done: [22]

No. C-73.

## SUTHERLAND

v.

## PURDY.

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[24]

[Testimony of John J. Ford, for Plaintiff.]

JOHN J. FORD, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. DONOHOE.

Q. What is your name? A. John J. Ford.

Q. How old are you? A. 37.

Q. Where do you reside?

A. I have resided in Valdez; my home is in the Shushana now.

Q. How long have you resided in Alaska?

(Testimony of John J. Ford.)

A. Between ten and twelve years.

Q. What has been your main occupation since you arrived in Alaska?

A. Mining and prospecting; I worked five seasons in the mail service; outside of that it has been mining and prospecting.

Q. Where did you first do mining and prospecting in Alaska?

A. On Lemon Creek, the Forty Mile country.

Q. You speak of the Forty Mile country—so the jury will not be confused I will ask you, do you know of a place called Forty Mile, Yukon Territory?

A. Yes, I do.

Q. This Forty Mile country you speak of is not in that section, is it?     A. No, it is not.

Q. It is within Alaska?

A. It is within Alaska.

Q. How far is it from Yukon City on the Yukon River?     A. I am not positive how far it is.

Q. Is that the section of country where Jack Wade Creek is and Steele Creek?     [25\*—2†]

A. Yes, it is further this way, about thirty-five miles.

Q. How long did you follow mining in that section?     A. About nine months.

Q. When did you first come into the Valdez or Cordova section of Alaska?     A. About 1904.

Q. Have you done any prospecting in and about Valdez?     A. I have.

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\*Page-number appearing at foot of page of certified Transcript of Record.

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(Testimony of John J. Ford.)

Q. For how many seasons?

A. About two seasons I put in in Valdez proper, that district, and the Shushana country and Copper River country different seasons there.

Q. Did you make any locations of quartz and placer in that section?     A. I did.

Q. And started their development?

A. Yes, sir, I did.

Q. Where were you working in June and the early part of July, 1913?

A. I was working at Teikhell.

Q. For whom and what were you doing?

A. The Alaska Road Commission.

Q. Was it from that point that you started to go into the Shushana District last summer?

A. It was.

Q. Who accompanied you?

A. My partner, Dan Sutherland, and Robert T. Smith.

Q. The plaintiff in this action?     A. Yes.

Q. By what route did you go in?     [26—3]

A. We went to Chitina; took the train to McCarthys and went in from McCarthys with horses.

Q. How many horses did you have?     A. Two.

Q. Who was the other party with you?

A. Robert T. Smith.

Q. There were three of you in the party?

A. There was.

Q. And you went up the Chitistone and crossed the glacier to Solo Creek?

(Testimony of John J. Ford.)

A. About Solo Creek—we crossed the Russell Glacier.

Q. You didn't take the Nazina Glacier?

A. No.

Q. Now, when did you, Sutherland and Smith arrive in the Shushana region?

A. Somewhere between the 16th and 18th of August—I think it was the 17th.

Q. Were you ever upon what is known as Big Eldorado Creek?     A. Yes, sir.

Q. Are you familiar with that creek and the locations on it?

A. I am, with the upper part of the creek.

Q. And up above the canyon?     A. Yes, sir.

Q. What is the name of the claim on Big Eldorado at the upper end of the canyon, that is located at the upper end of the canyon?

A. The way the canyon starts there No. 4 would be about the first claim going up the canyon.

Q. No. 4 Below Discovery?

A. Yes, sir. [27—4]

Q. You are familiar with No. 3 Below Discovery?

A. I am.

Q. You are familiar with the ground in controversy here known as the Surprise Fraction?

A. Yes, sir.

Q. And you are familiar with the claim above it?

A. Yes, sir.

Q. What name has the claim above this Surprise Fraction?

A. Why, it is located for Mr. Purdy by G. L. Gates,



(Testimony of John J. Ford.)

attorney-in-fact—it is No. 2 Below Discovery.

Q. That claim has been relocated by someone else?    A. Yes.    A. F. Nelson.

Q. What does he call the claim?

A. No. 2 Below Discovery.

Q. You are familiar with the upper end of the creek, where Bear Pup comes in and Granite Creek comes in?    A. I am.

Q. Have you at my request prepared a diagram or drawing representing the Big Eldorado Creek, the location of the Surprise Fraction and the location of the claims above and below this Surprise Fraction? Have you prepared such a diagram?

A. Yes, sir, I have.

Q. That diagram as I understand it is not drawn from a survey or on a scale?    A. No, sir.

Q. Does it correctly show the situation so far as the Surprise Fraction is concerned?

A. Yes, it does. [28—5]

Q. Examine that and see if that is the diagram you have testified to. (Handing witness paper.)

A. That is the map I drew.

Mr. DONOHOE.—We offer the map in evidence for the purpose of illustration.

Mr. LEEHEY.—Understanding the offer to be purely for the purpose of illustration and no claim that it is an accurate map, based on surveys, the defendant has no objection. The drawing is admitted in evidence and marked Plaintiff's Exhibit "A."

Q. You have two diagrams on this plat, will you explain to the jury what each of them means.

(Testimony of John J. Ford.)

A. The small one, the upper one, is Big Eldorado Creek, with Bear Pup and Granite Creek coming in and the lower one is simply the three claims on the creek drawn on a larger scale.

Q. What do the lines marked in red designate?

A. They designate the Surprise Fraction.

Q. And what is marked on the map No. 2 Below—what claim is that?

A. That is Mr. Purdy's claim.

Q. Has anybody else got a notice in that vicinity?

A. A. F. Nelson.

Q. Now, what is the claim immediately above the Surprise Fraction called on that drawing?

A. Two Below.

Q. What is the claim immediately below the Surprise Fraction called on that drawing?

A. Three Below.

Q. What are the writings designating monuments at the upper [29—6] end of the Surprise Fraction as shown on that diagram?

A. These writings?

Q. Yes, on the upper end—read what they are.

A. This in the blue pencil here, point where Purdy notice was posted, his initial monument.

Q. What is the other writing?

A. Sutherland's discovery and upper centre end.

Q. Now, going to the lower end of the Surprise Fraction, what is the writing there?

A. Sutherland's lower centre end.

Q. What is the other writing?

A. McKinney's initial monument, in blue pencil;

(Testimony of John J. Ford.)

Mr. McKinney located for Mr. Schultz.

Q. What is this stream?      A. Wilson Creek.

Q. Is this practically north?

A. It is, yes, to the best of my knowledge.

Q. And this is practically south?      A. It is.

Q. Now, on which limit of the running water in Big Eldorado Creek was the monument on which Purdy's notice was posted, on which limit of the creek?

A. The left limit, that is my memory.

Q. Just explain to the jury what you mean by right limit and left limit. And what miners mean by those terms.

A. Water running down stream on the right hand side of the creek is the right limit and left hand side facing down stream is the left limit.

Q. Now, in order to find what limit it is, you face down the stream and the right limit is on the right hand side and the left limit on the left hand side?

[30—7]      A. Yes.

Q. Did you go upon the ground, what is now known as the Surprise Fraction, on August 30, 1913?

A. I did.

Q. Who accompanied you there?

A. Dan Sutherland, my partner.

Q. What did you do upon reaching the ground now covered by the Surprise Fraction?

A. I read Mr. Purdy's location notice.

Q. Just point out to the jury on that diagram the point where you found Purdy's location notice.

A. This monument right here (indicating); it is

(Testimony of John J. Ford.)

marked with a blue pencil.

Q. That is at the upper end of what is now called the Surprise Fraction?     A. Yes.

Q. What did that notice contain as to the direction of the claim located by Mr. Purdy, how it lay from the place where the notice was?

A. He claimed 1320 ft. up stream.

Q. Now, if the claim was located as described in that notice point out to the jury where it would lie with reference to that plat.

A. It would lie here (indicating).

Q. And that is marked on that map by what designation?     A. Two Below.

Q. Now, you made a copy of that notice of Purdy's?     A. I did.

Q. Have you that copy with you?

A. Yes, sir. [31—8]

Q. Do you know if that copy is a true and correct copy of the notice posted on the ground?

A. Yes, I do.

Q. Will you produce that memorandum?

A. Yes, sir. (Witness does so.)

Q. That memorandum is made in your own handwriting?     A. It is.

Mr. DONOHUE.—We desire to have the witness read the memorandum into the record, unless there is some objection to it.

Mr. LEEHEY.—We object to it as incompetent, irrelevant and immaterial and a self-serving declaration. The witness claims to have gone on this property nearly two months after its location, not in the



(Testimony of John J. Ford.)

presence of the defendant or anyone in his behalf,—after two months time had elapsed and when the notice might have been and probably would have been much obliterated and could have been changed by hundreds of persons; to undertake to prove the contents of the notice as of the date it was posted by such testimony is clearly incompetent.

By the COURT.—Have you made any request for the original to know whether you can get it or not?

Mr. DONOHOE.—We never took it away; it would be a violation of the law to do so. I will question the witness further.

Q. When did you last see that notice posted on the ground, about when?

A. Some time in September.

Q. Was it within your power or your partner, Sutherland's power, to produce that notice in court?

A. No, sir.

By the COURT.—You may demand of the defendant if they have that [32—9] notice or can produce it, to do so.

Mr. DONOHOE.—The plaintiff at this time demands of the defendant that he produce his original notice as posted on the ground and in the absence of so producing it, we will ask the Court to permit us to prove the copy.

Mr. LEEHEY.—We will be very glad to produce the notice; it will probably take two or three weeks to do so. We haven't it here. This is the first intimation we have had that there would be the slightest thing claimed to be wrong about that no-

(Testimony of John J. Ford.)

tice. We are perfectly willing to produce it and will produce it, but we object to any secondary evidence as to its contents without any opportunity on our part to produce it.

Objection overruled. Defendant allowed an exception.

Q. Read that notice into the record as you made it.

A. There was a letter or two missing but I made an exact copy of what was on it. I have i-c-e and p-l-a-c-e, that was notice of placer location as I took it, the location commencing—locating a claim of twenty acres for placer mining purposes, situated on Eldorado Creek, a tributary of Wilson Creek, Chisana Mining District, Alaska, more particularly described, to wit: Commencing at this initial post and running up stream 1320 ft. to centre end post and 330 ft. on each side of initial post and upper centre end post; discovered and located July 3rd, 193; locator F. W. Purdy, G. W. Gates, Attorney.

Q. What kind of a monument was that notice in?

A. That notice was in a rock monument.

Q. In a rock monument?

A. Yes, sir. [33—10]

Q. A large monument? Describe the size of it.

A. A monument about two feet and a half high and about the same at the base,—I should say two feet and a half, something like that.

Q. That was the first time that you read that notice, August 30th? A. Yes, sir.

Q. Now, you say that Sutherland was with you at

(Testimony of John J. Ford.)

that time?     A. He was.

Q. What next did you do in reference to the location of the Surprise Fraction?

A. I next read Mr. A. F. Nelson's notice in a monument that was near.

Q. How far was that notice from Purdy's?

A. About three feet.

Q. And how did Mr. A. F. Nelson's notice describe this claim?

Mr. LEEHEY.—We object to that as incompetent, irrelevant and immaterial.

Mr. DONOHUE.—I will withdraw the question.

Q. Was there any other notice there?

A. None but those two.

Mr. DONOHUE.—I believe that question I put before is competent. We plead when we went upon the ground that it was unappropriated and unoccupied public domain and I think in order to establish that allegation, it is necessary to prove the Nelson notice. We renew that question—I will put it again.

Q. What direction did Mr. Nelson's notice indicate the way this claim lay from the monument containing the posted notice?

Mr. LEEHEY.—We object as incompetent, irrelevant and immaterial and not the best evidence, and self-serving. [34—11]

The objection was by the Court sustained. To which ruling plaintiff is allowed an exception.

Q. When you arrived at the upper end of what is now the Surprise Fraction, was there any notice posted at that point claiming the ground down the stream?     A. No, sir, there was not.

(Testimony of John J. Ford.)

Q. What did you next do toward locating the Surprise Fraction, after you had read the notice?

A. We went down the creek—

Q. Which side of the creek?

A. I went down the right limit, my partner went down the left, looking for stakes and we met down at the monuments at No. Three Below.

Q. Did you encounter any stakes along on your way down?     A. No, sir.

Q. What did you find when you arrived at the lower end? Point out to the jury on that diagram where that lower end is.

A. We went from here down to here (indicating).

Q. From the upper end to the lower end of what is shown as the Surprise Fraction?     A. Yes, sir.

Q. What did you find at the lower end of the claim as to monuments?

A. We found a monument of three rocks there, about a foot and a half high.

Q. Was there any notice in it?

A. There was.

Q. Whose notice was it?

A. It was Mr. Schultz's, by W. E. McKinney, attorney. [35—12]

Q. How did it describe the claim?

Mr. LEEHEY.—We object as incompetent, irrelevant and immaterial and not the best evidence.

Mr. RITCHIE.—We insist it is a circumstance to show the general situation.

Mr. DONOHUE.—It is the adjoining claim below, but I think we are entitled to take up every notice or



(Testimony of John J. Ford.)

any recording anywhere near that property to establish the fact that it was unoccupied and unappropriated public domain when we went on it. They have denied that allegation and it is in issue and I know of no other way to show that it was unoccupied and unappropriated public domain than to show that all the notices described some other ground than this ground in controversy.

By the COURT.—I am not at this time satisfied on that question but I will sustain the objection at this time and hear you later on it; I take it that any markings on any of the claims adjoining, of other parties, cannot affect the rights of either party to this case.

Mr. DONOHUE.—I do not contend it is absolutely essential but I will ask an exception to the ruling. Exception allowed.

By the COURT.—I will consider the matter and you can present it at some other time.

Mr. DONOHUE.—To preserve that, I wish to put another question.

Q. What other notice did you find there, or monument?

Mr. LEEHEY.—We object to the notice. We admit the testimony as to monuments would be competent, if the monument is properly identified.

By the COURT.—Anybody else's notice on adjoining claims could not be binding or affect the rights of these parties. I [36—13] will sustain the objection as to any notice, unless it be confined to the limits of this claim.

(Testimony of John J. Ford.)

To which ruling plaintiff is allowed an exception.

Q. Did you find any other monument there?

A. I found a post.

Q. At the lower centre end, did you find any other monument excepting the McKinney monument?

A. No monument; there was a post there.

Q. Was there a post?      A. Yes.

Q. Whose post was it?      A. Richard Bell's.

Q. Did you read the writing on it?      A. I did.

Q. Did it cover any of the ground embraced in the Surprise Fraction?      A. No, sir.

Q. The claim as described in the writing did not cover any of the land in the Surprise Fraction?

A. No.

Q. Now, did the writing in the first monument you have testified to cover any of the ground now embraced in the Surprise Fraction?

A. It did not.

Q. What next did you do after arriving at the lower end?      A. After reading this notice?

Q. After reading this notice—what did you do further in relation to the locating of the Surprise Fraction?

A. We paced back up the creek to Mr. Purdy's monument.

Q. Purdy's monument at the upper end? [37—  
14]

A. Yes, paced the distance.

Q. And what distance was it?

A. About 1300 feet.

Q. What next did you do that day in regard to

(Testimony of John J. Ford.)

discovery or anything in connection with the location of that claim?

Mr. LEEHEY.—We object to that as leading.

Objection overruled—defendant excepts.

A. We did some panning there; we took our tools and did some panning.

Q. What results did you get from the panning, if any?

A. We got colors in every pan, got lots of black sand—some coarse colors.

Q. You have had experience in placer mining?

A. I have.

Q. And do the results that you obtained from that panning justify further exploration of that ground for mining purposes?

A. They certainly did.

Q. What next did you do?

A. I went down and put in a lower centre end monument.

Q. Describe that monument—point out on the plat where you put in the lower centre end monument?

A. This is the monument here (indicating). I built a monument of rocks, about three feet high—a little higher—and four feet at the base.

Q. Did you put any writing in that monument?

A. I did.

Q. Just state writing you put in there—how did you put it in? By paper?

A. I had a piece of paper—I had some in my pocket-book and [38—15] tore a piece out.

Q. What writings did you make?

(Testimony of John J. Ford.)

A. I put on that, the Surprise Fraction, lower centre end, located August 30th, Dan Sutherland, running 1300 feet up stream.

Q. And where did you place that paper?

A. On top of the monument and laid a flat rock, laid another one over it, and let the paper stick out so any one coming along could see there was a notice there.

Q. What next did you do that day toward perfecting that location?

A. I went over the corners then.

Q. The lower corners you say?      A. Yes.

Q. Which lower corner did you go to first?

A. The lower corner on the right limit first.

Q. Point out to the jury on the diagram where that is.

A. That would be this corner right here (indicating).

Q. What is that marked now as the corner of the Surprise Fraction?      A. Corner No. 2.

Q. State to the jury what you found at that corner in the way of markings.

A. I found three posts there, three stakes.

Q. Describe them.

A. There was a willow stake, about two feet high—

Q. Any writings on it?

A. There was none—and there was a spruce about three feet high.

Q. Any writings on it? [39—16]      A. Yes, sir.

Q. What writing?

A. Marked Richard Bell, arrow pointing down



(Testimony of John J. Ford.)

stream, 1320 feet on it.

Mr. LEEHEY.—Is that on the right limit?

Mr. DONOHOE.—Yes, lower corner of the right limit.

Q. What was on the other stake, if anything?

A. A corner stake, bench claim—something about a bench claim.

Q. Is that all that was on it?

A. That is all—Corner Number 2 or something, of bench claim.

Q. Was there any stake at the right limit, at the lower corner of the right limit, of what is now the Surprise Fraction, indicating the ground above was located, or the ground now embraced in the Surprise Fraction was located?

A. No, sir, there was not a sign.

Q. What next did you do that evening?

A. I came up over here (indicating) and crossed back up and went up to Number 3 corner.

Q. That is the lower left limit stake?

A. That is the lower left limit corner, yes.

Q. And marked Surprise Fraction Corner Number 3? A. Yes, sir.

Q. What did you find there in the way of stakes or anything?

A. I found Richard Bell's stake there, his corner stake.

Q. What was on it?

A. Richard Bell and there was an arrow pointing down stream 1320 feet.

Q. What other stake did you find there?

(Testimony of John J. Ford.)

A. I found a willow stake there.

Q. How large was that? [40—17]

A. I found a willow stake there about two feet, not more than two and a half feet, high.

Q. How thick?

A. An inch or an inch and a half.

Q. Any writings on it? A. None.

Q. Did you find any other stake there?

A. Not at that corner, no, sir.

Q. Now then what next did you do? Was there any monument or stake or marking of any kind upon the ground at that point that would lead you to believe that the ground now covered by the Surprise Fraction was previously located?

A. No, sir, there was not.

Q. What else did you do there?

A. I crossed down to the creek and went up to where Sutherland was making his location.

Q. Point out on the map where that is.

A. Right here (indicating).

Q. The upper centre end of the Surprise Fraction? A. Yes.

Q. What had Sutherland done during your absence towards locating that claim?

A. Why, he was erecting a monument—I didn't stop there but a minute then.

Q. You went back there later in the day?

A. Yes, sir.

Q. Where did you go then?

A. I went up to the left limit corner of Number 2 below.

(Testimony of John J. Ford.)

Q. And it is the upper left limit corner of the Surprise Fraction now? [41—18]

A. Yes, Number 4 Corner.

Q. Corner Number 4 Surprise Fraction?

A. Yes, sir.

Q. What did you find at that corner in the way of stakes? A. I found two stakes there.

Q. Describe them.

A. One was a spruce stake.

Q. Any writing on it? A. There was.

Q. What was on it?

A. George H. Shade was written then, by A. F. Nelson, attorney and an arrow pointing up stream, 1320 feet and I think the date—I am not sure.

Q. What was on the other stake? A. Nothing.

Q. No writing at all? A. No.

Q. Was there any stake or monument at that point that would lead you to believe that the land now covered by the Surprise Fraction was previously stakes or located? A. There was none.

Q. Where did you go from that point?

A. I crossed over then and went up to the Number One corner of the Surprise Fraction.

Q. That is the upper right-hand limit?

A. Yes, sir.

Q. What did you find there in the way of stakes?

A. Found three stakes there.

Q. Describe them.

A. There was a spruce stake there—

Q. Any writing on it? [42—19] A. Yes, sir.

Q. What was it?

(Testimony of John J. Ford.)

A. George H. Shade by A. F. Nelson, an arrow pointing up stream, 1320 feet.

Q. What else did you find there? Is that the same Nelson who had the monument that you have testified to previously close to the Purdy monument?

A. Yes, sir.

Q. Now, then, what other stake did you examine there?

A. There was a willow stake there; it said corner stake of bench claim or something like that.

Q. How far was that from the Nelson stake?

A. Probably two feet?

Q. What other stake was there?

A. There was a willow stake there, about two feet high, something like that—two and a half.

Q. Any markings on it? A. There was none.

Q. Did you find any stakes or monuments at that corner that would lead you to believe that the ground now covered by the Surprise Fraction was staked?

A. No, sir, I did not.

Q. Where did you go after you examined that corner Number One?

A. I went back to where Dan Sutherland was, his initial monument.

Q. What had Sutherland done in your absence towards locating the Surprise Fraction?

A. He had erected a monument there.

Q. How high was that monument—describe it?

A. The monument was three feet high, a little better; four [43—20] feet at the base and it stuck in the form of a pyramid in the rocks.



(Testimony of John J. Ford.)

Q. Did you witness any paper for him there?

A. Yes, sir, I did.

Q. What?      A. His notice of location.

Q. You examined the location notice he had written, did you?      A. Yes, I read it.

Q. Where was that location notice deposited after it had been signed?

A. That was put in the initial monument, in this monument marked with a lead pencil here, and a flat rock laid down and another one over it and the notice was sticking out.

Q. Was that notice written on a printed location blank partly?      A. Yes, it was on a printed form.

Q. Was that about all that was done that day towards this location work?

A. That was all.

Q. And where did you go after posting the notice of location, you and Sutherland?

A. We went home to our camp then.

Q. Where was your camp?

A. Up the mouth of Bonanza Creek, on Johnson Creek.

Q. How far away from this land?

A. Between two and a half and three miles.

Q. When did you return to this ground?

A. The following day.

Q. August 31st?      A. Yes.

Q. What did you do that day toward perfecting the location of [44—21] Sutherland, Sutherland's location, of the ground?

A. Put in the corner stakes.

(Testimony of John J. Ford.)

Q. What corner stakes did you put up first?

A. I put up the Number One corner stake on the right limit.

Q. How did you ascertain the location of that Number One corner, where it should be located?

A. I started at Sutherland's initial monument and paced it to where these other corner stakes were.

Q. What distance did you find that to be?

A. Why that was short of 330 feet, about 15 feet short.

Q. You made it about 315 feet?      A. Yes.

Q. And you erected a corner monument there, or post?      A. I did.

Q. Just describe to the jury what you did there when erecting that corner post.

A. I put in a willow stake there about four feet high, somewhere about two inches or two and a half through, and took a shovel and cut the tundra through; there was no rocks, and I piled it up, probably a foot and a half high so everybody could see it.

Q. Around the stake?

A. Yes—and I wrote on it.

Q. Describe what you wrote on the corner?

A. Corner stake Number One Surprise Fraction, Dan Sutherland, locator, and I think I put the date.

Q. How is that again?

A. Corner Stake Number One of Surprise Fraction, Dan Sutherland, locator and I think I put the date, August 30th if I remember right. [45—22]

Q. Did you put any distance or arrows or anything of that sort?

(Testimony of John J. Ford.)

A. I did—I put an arrow on the inside of the stake, pointing down the stream and marked 1300 feet to Corner Number 2, as I remember it.

Q. What else?

A. And I put an arrow pointing to the initial monument and wrote 330 feet to the centre end.

Q. Where did you go from that point during that day?

A. I went down to this lower right limit corner, then walked along down through here (indicating on plat.)

Q. What corner is that as marked on the map?

A. Corner Number 2 of the Surprise.

Q. What did you do at that point towards fixing the corners of the Surprise Fraction?

A. I went down there and had to go down to the creek to get the distances and I went down to our centre end and paced the distances to these corners and found they were short—I found it was a little short there, probably fifteen or twenty feet short of 330 feet.

Q. Did you establish a corner there?      A. I did.

Q. Describe what you did?

A. I put in a stake there, about four feet high, about two or two and a half inches through, in thickness, and I banked sod around it, probably a foot and a half, tundra I cut, and I marked it Surprise Fraction—I am not certain the terms I got first—I think it was Surprise Fraction Corner, stake Number 2; it might have been Corner stake Number 2 of Surprise Fraction; it was one or the other. [46—23]

(Testimony of John J. Ford.)

Q. What else did you write on it, if anything?

A. Dan Sutherland, locator, and I put the two arrows on it.

Q. The same as you did in Number One?

A. Yes.

Q. Describe how you put those arrows.

Q. I put them on the inside of the stake, one running up stream and claiming 1300 feet to Corner Number One.

Q. Where did you put the other arrow?

A. I pointed that to the centre end and claimed 330 feet to the centre end.

Q. Now, why didn't you put those corner stakes at the full 330 feet?

A. Because others had staked there—there was corners of a bench claim there.

Q. And you didn't want to conflict with them?

A. No.

Q. What else did you do that day toward locating that claim?

A. Why, I went down there and went to work as I remember doing location work.

Q. While you were putting up these stakes you have described, where was Sutherland?

A. He was putting up the corners on the left limit.

Q. You didn't visit those corners that day, did you? A. No.

Q. Where did you commence to do work?

A. About 75 feet below Sutherland's initial monument.

Q. Was Sutherland with you there?



(Testimony of John J. Ford.)

A. He joined me, yes.

Q. How long did you work there that day?

A. Worked until about twelve o'clock. [47—24]

Q. How many hours that day?

A. Five hours, I should judge.

Q. You mean five hours for each of you?

A. Yes.

Q. What work did you start? What was the nature of the work you were doing?

A. We were putting a cut in for bedrock in the creek and thought we would try to get bedrock there.

Q. Did you encounter frost? A. I did.

Q. How many feet did you go before you encountered frost? A. I think about two feet.

Q. Is that all the work you did that day in connection with that claim? A. Yes, sir, that is all.

Q. And then returned to your camp at the month of Bonanza? A. Yes, sir.

Q. Did you go back the next day, the first day of September? A. I did.

Q. Who accompanied you that day?

A. Judge Tucker.

Q. Anyone else? A. Dan Sutherland.

Q. Tell the jury how Judge Tucker came to accompany you?

A. Well, I went to Judge Tucker that second night we were down there and told him I would like to have him come up and look the claim over. There was some ground there that had not been staked and we wanted everything safe and right and wanted him to come up as a witness so if anything was moved after-

(Testimony of John J. Ford.)

wards or anything, he would know it. [48—25]

Q. What did you do on that day towards further locating the claim?

A. Put in side lines, side stakes.

Q. Which side lines did you put in?

A. On the right limit, these two here (indicating).

Q. What kind of side lines and what kind of markings did you place on these side lines?

A. Had two willow stakes about four feet high and probably two inches through—it might not have been more than an inch and a half.

Q. What marking did you put on them?

A. Side lines, Surprise Fraction, and put arrows pointing each way, up and down.

Q. Did you do that with both the stakes?

A. I did it on both of them, yes.

Q. What is the topography of that country there where the side lines of the Surprise Fraction lay?

A. Well, there is a kind of glacier moraine bench around there, but it is fairly level so you can look down.

Q. Any timber there?

A. No timber. Willows.

Q. Standing at corner Number One shown on the map, can you see the first side line stake you put in?

A. Yes, sir.

Q. And standing at that side line stake, can you see the second? A. Yes.

Q. And from there, can you see the next corner?

A. Yes.

Q. Did you do anything further that day in re-

(Testimony of John J. Ford.)

gard to locating the claim or did you start further development work? [49—26]

A. I went with Mr. Tucker and took copies of the notices there again.

Q. You had Judge Tucker make a copy of the notice at the upper end of the Surprise Fraction?

A. Yes, and all the notices around there.

Q. Did Judge Tucker make a copy of the notice by Mr. Purdy at the upper end? A. He did.

Q. And took copies of any other notices there?

A. He made a copy of Sutherland's notice; he made a copy of Schultz's notice by McKinney, attorney.

Q. Where was that Schultz notice?

A. That was at the foot of the Surprise Fraction.

Q. Point that out to the jury.

A. Right here in blue pencil, Number Three Below. A. Yes.

Q. What other notice did he make a copy of?

A. He made a copy of Bell's notice there, Richard Bell's.

Q. Point out the place where Bell's notice was.

A. His stake was really between these two monuments.

Q. Which two monuments?

A. It was our lower centre end.

Q. Did you do anything else toward locating that claim on the first day of September?

A. That is all I recollect; we looked the ground over again to see if there was a sign of anything having been done there or stake or anything.

(Testimony of John J. Ford.)

Q. Did you find anything on that ground now embraced within the lines of the Surprise Fraction that indicated to you [50—27] that there had ever been any work or mining done upon it?

A. There was absolutely nothing there to show.

Q. And did you find any markings or notice that would lead you to believe that that ground was ever located? A. No, sir.

Q. You didn't do any work on that day, the first day of September? A. No.

Q. When did you next return to the property?

A. I returned the following day, on the second of September.

Q. Did anybody accompany you that day?

A. No, sir.

Q. What did you do after arriving on the ground?

A. I went down and went to work in the cut.

Q. Did you see any other person there that day, or was it the next day?

A. About an hour after I had been working there, McKinney came along.

Q. And what did he say to you, if anything?

A. He said, "Hulloa Ford," and I said, "Hulloa Dud."

Q. You knew McKinney before? A. I did.

Q. How long before did you know him?

A. I have known him at Forty Mile, about eight years ago.

Q. What did he say as to whom he represented and as to who had rights there?

A. Well, some talk came up about the Fraction



(Testimony of John J. Ford.)

and I asked him to go up and look at the notice and he read the notice.

Q. Which notice have you reference to?

A. Purdy's notice. [51—28]

Q. You say McKinney went up with you and read that notice? A. Yes, sir, he did.

Q. And what did he say to you at that time?

A. He made some talk about things having been moved. I asked him to go over the claim and show me one stake or one sign that it had ever been located, anywhere, and he said, "Ford, I don't go nothing on stakes" and wouldn't go.

Q. What did he say, if anything, with reference to the Purdy monument?

Mr. LEEHEY.—We object to any statements made by McKinney.

Mr. DONOHUE.—I will qualify him.

Q. Did McKinney say anything to you at that time as to whom he was representing or as to any interest he had in the ground in controversy in this action?

Mr. LEEHEY.—We object to any such statement as that.

By the COURT.—Do you deny that McKinney was acting for or on behalf of the defendant Purdy? I understand from your affidavits that McKinney figures in the matter.

Mr. LEEHEY.—There is not anything in the evidence to qualify McKinney; McKinney did record the location notice, but we have not in any manner, anywhere in the pleadings, said that McKinney was

(Testimony of John J. Ford.)

the agent of the defendant.

Mr. DONOHOE.—I will follow it up by showing McKinney did the so-called assessment work there; he must have been an agent.

Mr. LEEHEY.—That doesn't make his statement binding on the defendant.

Objection overruled; defendant allowed an exception.

A. Not that day,—he said nothing about it.

Q. Have you stated about all the conversation that took place between you and McKinney that day? [52—29]

A. Well, he told me then, "I am going down here and going to work anyhow"; he had a stick on his shoulder.

Q. Was McKinney alone at that time?

A. Yes, sir.

Q. What did you do during that day with reference to the claim, the Surprise Fraction?

A. I told him then we had staked that ground and it was virgin ground and there wasn't a stake in it when we came there and we intended to hold it and he told me he was going down and going to work anyway and I went to work on my own cut.

Q. How far below you did McKinney go?

A. About two or three hundred feet.

Q. How long did you work there that day?

A. I worked until about half-past four or five o'clock that night.

A. How many hours did you put in there?

A. Between eight and nine hours.

(Testimony of John J. Ford.)

Q. Was that all that occurred that day?

A. That was all that occurred to the best of my recollection that day.

Q. Did you return again on the third of September?     A. I did.

Q. Did you meet anyone there at that time?

A. Yes; there had been a light snow and I passed our location monument going to work and I see tracks there and noticed that the board with Purdy's notice on was missing.

Q. What was Purdy's notice written on?

A. Written on a board.

Q. Describe the size of the board to the jury.

[53—30]

A. A board about ten inches long and probably about three inches wide—looked like the bottom of a barrel had been cut for the notice.

Q. When you first saw that notice, where was it?

A. It was at the lower end of Number Two, at the upper end of the Surprise Fraction.

Q. How was it fastened in the monument?

A. There was a rock laid on top of it, laid in the rock monument, and rock piled over it.

Q. Testify what you saw in regard to the Purdy monument.

A. Going down to work, there had been a light snow and I saw tracks there around the monument and looked and saw the notice was missing.

Q. That is the Purdy notice?

A. Yes. And I went down and went to work.

Q. Did you meet McKinney later that day?

(Testimony of John J. Ford.)

A. I did.

Q. State what took place.

A. I was working in the cut and somebody spoke  
(Testimony of John J. Ford.)

and I jumped about two feet—pretty near broke my tools—and looked around and saw a man there.

Q. In your cut?

Mr. LEEHEY.—This is all under the same object—we object to it as incompetent, irrelevant and immaterial.

By the COURT.—Your objection to any conversation with McKinney?

Mr. LEEHEY.—Yes.

Objection overruled—defendant excepts.

Q. State the conversation that took place at that time.

A. McKinney said, “Do you know these two men?” and I said, “I know Mr. Schultz” and he named the other gentleman—I have [54—31] forgotten his name—and he said, “I wish to notify you before these two gentlemen that I am acting for Mr. Gates and that I moved Purdy’s notice,—acting for Purdy and Gates—and moved Purdy’s notice down to the lower end of the claim to its proper monument,” and he said, “Did you get that?” and I said, “I do,” and he says, “I want to notify you to get off this ground and not do any more work here and do you get that?” and I said, “I do”; and I said, “McKinney, I think this is the proper time for me to notify you not to do any more work here, before these witnesses,” and I repeated then



(Testimony of John J. Ford.)

that we had staked the ground, that there was no stakes on it when we staked it, but it was virgin ground and we intended to hold it.

Q. And later, did you see that notice of Purdy's at the lower end of the claim?     A. Yes, sir.

Q. When and where did you next see the location notice of Mr. Purdy that was formerly at the upper end of what is the Surprise Fraction?

A. I saw it at the upper end of Three Below, at the lower end of Surprise Fraction.

Q. Where was it?

A. It was in the Schultz monument there, his initial monument of Three Below.

Q. That is the monument where Mr. Schultz was located by McKinney as attorney in fact?

A. That was the monument.

Q. What kind of a monument was that that you saw the Purdy notice in, after McKinney notified you about moving it?

A. It was a monument consisting of three rocks, probably it [55—32] was less than two feet high altogether—less than two feet high. There was three rocks setting on top of each other like that (indicating).

Q. And how was the board fastened in it?

A. It was laid in between the two upper rocks—laid in there.

Q. How was the Schultz notice by McKinney, on paper or on a board?     A. On a board.

Q. What kind of a board?

A. The same kind of a board—the same size as Purdy's.

(Testimony of John J. Ford.)

Q. Did you ever compare the handwriting on those two boards?     A. I have looked at them often.

Q. Will you state whether they were in the same handwriting or not, each location?

Mr. LEEHEY.—We object to that as incompetent, irrelevant and immaterial.

Objection sustained; plaintiff allowed an exception.

Q. Where was this Purdy notice after McKinney moved it down in reference to the notice of Schultz for Number Three Below?

A. They were both in the same monument.

Q. In different places in the monument?

A. No, they were under the same rock—both laid there with the one rock holding them down.

Q. What else occurred that day after McKinney had notified you to get off the ground?

A. There was some more words there then. He told me that the notice had been moved upstream and he wouldn't put it beyond me to have moved it. There was three to one there and I didn't know but what they were going to beat me up and I don't remember all of it. [56—33]

Q. What did you do by way of doing work on the claim that day?

A. I continued working. McKinney told me then that Gates staked this ground and he says, "I have a quarter interest in everything he stakes—there are four of us; if I had staked it, you wouldn't be doing any work here"; and I said, "Dud, I haven't any weapons here and am not looking for trouble, but

(Testimony of John J. Ford.)

I am sure going to do this work, and if you want to prevent me you will have to kill me." I wanted him to understand that we were ready and were going to do the work.

Q. You did more work that day?

A. Yes, I continued in that cut that day.

Q. How many hours work did you do that day?

A. About eight hours.

Q. When did you next return to this ground?

A. I returned the following day.

Q. And what did you do that day?

A. I worked in the cut all day that day.

Q. Did you have any conversation with McKinney that day, or anyone else?

A. It seems to me that McKinney came up that day and asked me my name and Dan's name, and I told him.

Q. Dan Sutherland you mean?      A. Yes, sir.

Q. Did you work in the cut that day?

A. I did, all day.

Q. That was the 5th of September?

A. That was the 4th of September.

Q. Did you return again on the 5th?      A. I did.

[57—34].

Q. What did you do that day?

A. I worked there in the cut.

Q. All day?      A. All day.

Q. When did you next return?

A. I worked all day on the 5th; it was either the third or fourth I left the cut about an hour to show a fellow who had killed a caribou where he could get

(Testimony of John J. Ford.)

same and I returned to the cut.

Q. On the fifth you worked all day? A. Yes.

Q. And what did you do on the 6th?

A. Worked all day on the 6th is my recollection.

Q. And on the 7th?

A. I am not sure whether I worked on the 7th or not.

Q. How many days work did you you do? Did Sutherland help you part of the time on this work?

A. He did.

Q. How many days work were performed on that claim after you located it and previous to the filing of your certificate of location—how many days work for one man? A. Nine days.

Q. What was the going wages in that camp for similar work? A. \$12.50 a day.

Q. Can you describe the dimensions of the work done by you and Sutherland on that claim?

A. Pretty close to it, yes.

Q. Describe it the best you can.

A. We ran a cut in the creek bottom 45 feet long and between two and two and a half feet deep on an average and two and [58—35] a half to three feet wide; the reason why it wasn't deeper it kept holding us up all the time,—we couldn't cross.

Q. What else did you do?

A. We saw there was no chance getting down there and we went over and went to work on the bench and tried to cut the rim. We put in a cut there 18 feet long and somewhere between four and five feet wide and about six feet deep, I think, on the average.



(Testimony of John J. Ford.)

Q. It was six feet deep at the base of the cut when you stopped?     A. Much deeper than that.

Q. It would average six feet?     A. Yes, sir.

Q. Did you strike the rim?

A. No, we did not.

Mr. DONOHOE.—That will be all at this time.

Cross-examination by Mr. LEEHEY.

Q. How long were you in the Shushana region altogether?

A. We arrived there somewhere between the 16th and 18th of August, and I left there on the 18th day of December.

Q. You located several other claims besides this?

A. I and my partners you mean?

Q. Yes. In the first place, you are a partner of Sutherland in the enterprise?     A. Yes, sir.

Q. And are equally interested with him in this claim in controversy in this action, designated as the Surprise Fraction?

A. We had an equal interest in all the claims we staked. [59—36].

Q. It was the intention when the claim was staked that you were to be an equal partner in it?

A. Yes, sir.

Q. And that relation has continued ever since and still continues?     A. Certainly.

Q. Did you stake some other claims under that partnership arrangement?     A. We did.

Q. Did you stake any other claims that are in dispute?     A. None.

Q. Neither you nor Sutherland?

(Testimony of John J. Ford.)

A. Not to my knowledge.

Q. You are positive that none of the other claims you staked were what is called jumped?

A. I relocated—Joe Clark and I relocated Two Above on Big Eldorado.

Q. That was claimed by someone else?

A. Joe told me not; Joe was a Forty Miler and told me to stake it for an interest with him—we never did any work. I guess he knew.

Q. When did you first go on Eldorado Creek, Big Eldorado Creek?

A. It seems to me it was probably the 20th or 23d of August, somewhere in there.

Q. How did you approach the creek, from what place did you start?

A. Went up Bonanza, stopped at James' ground and went shoveling there; talked a while and went up to Clark Whitten's; he is an old friend of mine—and I asked him about the camp [60-37] and Carl said to me, "Go and take this pan and pan a little," and I panned upon his ground a while and some other fellows came that I knew and talked to me and Carl said, "Gold Run is a good part of the country, go in there and find something," and we started over that way and met a man on Chicken and he told me that they had located claims up on Gold Hill and we claimed up there—got up there and had maps of the country.

Q. I am speaking of the time you went to Big Eldorado.

A. We were up Gold Hill and looked over the

(Testimony of John J. Ford.)

country on the Big Eldorado side and went down there—we were looking over the country.

Q. How did you go over, did you go up the creek or across the creek or down the creek or what way?

A. I went up Bonanza and went up as far as Chicken Creek, came over Gold Hill and dropped from Gold Hill on to Big Eldorado.

Q. You went across country? A. Yes.

Q. Where did you strike?

A. Big Eldorado—it might have been Three Above or down on Discovery, I don't know.

Q. You struck it above the claim you located as the Surprise Fraction? A. Yes.

Q. You knew Dud McKinney for several years?

A. I had known him in the Forty Mile country.

Q. And you also knew Gates, by sight at least?

A. I don't think so—I was trying to recall Gates.

Q. You knew Purdy? [61-38]

A. Not to my recollection; I think he was there when I was there.

Q. You made inquiry, of course, concerning the ownership of property on the creeks, did you not?

A. Why, no.

Q. Did you go to the Recorder's office to examine the records?

A. No, I never looked over a record in my life I know *if* except in Valdez this spring.

Q. Didn't you, when you went into the Shushana diggings, go into the Recorder's office to learn the names of the locators on the different creeks? And the locations?

(Testimony of John J. Ford.)

A. No, I naturally asked where James was and where the good ground was.

Q. You didn't make any effort to check up from the records to see how the different creeks had been located and by whom?      A. Why, no.

Q. The fact is you never went to the Recorder's at all and never examined the records?

A. I was down at the Recorder's office two or three times and my camp was just above there.

Q. Did you ever examine the records?      A. No.

Q. When you went up on Eldorado Creek you knew that McKinney and Gates and fellows from Forty Mile and Dawson had staked several claims there?

A. Not when I went on the creek, not to my knowledge.

Q. When you first went on this ground which you located as the Surprise Fraction, didn't you know that it was already claimed by Gates for Purdy?

A. I knew that the better part of that creek was located by them at the time we went on it and staked it, yes, sir. [62-39]

Q. And you knew that Gates claimed to be the attorney-in-fact for Purdy?

A. I didn't know anything about Gates at that time, only what McKinney mentioned and was talking about it that day.

Q. When was it that you were talking to McKinney, was it before you went on Big Eldorado Creek?

A. No, I had been over on Big Eldorado Creek and



(Testimony of John J. Ford.)

made that trip and came back there and I went over and saw Dud.

Q. When was it that you saw Dud McKinney you are speaking about now with reference to the time you located, before or after?     A. It was before.

Q. How long before?

A. I should judge four days, it might have been less or more than that—I think probably three or four days.

Q. You were advised from that or some other source that Gates claimed, either for himself or somebody else, the claim known as Number Two Below on Big Eldorado, were you not?

A. Before we located?

Q. Yes—that he claimed the location?

A. I think that McKinney told me in the conversation that Gates owned Two Below on Big Eldorado, that is my recollection, and he owned One and Three Below.

Q. Did you learn who located One Below on Big Eldorado at the same time or before you made the location of the Surprise Fraction—Did you learn who located and claimed Number One Below on Big Eldorado?     A. Yes, I did.

Q. Who was that?

A. Why, it was McKinney had his notice on the upper end, [63-40] claiming Number One Below, down stream and Purdy had his notice and claimed up stream.

Q. Before you went on the ground, before you made the attempted location of August 30th, you

(Testimony of John J. Ford.)

knew that McKinney claimed Number One himself, did you not?

A. I didn't know—I was mixed on the whole thing. I went to him for a lease; I thought he owned One and Two Below, and asked him for a lease and he said he didn't own Two Below; that was the conversation. It was after the first time we went on Eldorado Creek and before we located the Surprise Fraction.

Q. And you asked McKinney for a lease of Number One and Two Below?

A. That is what I asked him.

Q. For both claims?

A. Yes. At that time, and I guess still is now, the notice on Discovery and on One Below was missing, the location notice and I wasn't exactly straight in my mind as to who owned the ground or how the claims lay and I thought that Discovery—what is Discovery now and what is Two Below now or One Below—I thought that was McKinney's ground and it was One and Two Below; that is what I had in my mind and I wanted a lease on it and I asked him for a lease on One and Two Below and he told me it might be arranged and he would see Schultz; then he told me that he would have to see Gates about Two Below.

Q. Did he tell you afterwards he saw Gates?

A. I don't recollect whether he did or not, I never saw him afterwards until I saw him in the cut.

Q. Didn't he tell you after that and before you made the attempted [64-41] location that he had

(Testimony of John J. Ford.)

seen Gates and it was all right, he had arranged a lay for you on the ground?

A. I don't recollect any such conversation or ever having seen him again.

Q. You say the time you talked with McKinney in which you requested this lease was some four days before you made the attempted location?

A. Yes, sir, I think so.

Q. Did you see McKinney after that again before the time he came on the ground that you have been describing in your testimony?

A. I will tell you—I used to go up by James' ground and there was always a crowd there, but I didn't fool around there any; there was always a crowd there and I might have passed Dud and said Hulloo but I don't think I did; I don't recollect seeing him again. I had it in my mind to tell him when I saw him, because he had been kind enough to offer me the lease, that I had decided not to take it because the ground was in litigation. I know I would have told him that if I had seen him.

Q. It was in litigation?

A. It apparently was in litigation; it had been re-located by Nelson and I had been making enquiries first as to the rights of the thing.

Q. McKinney told you you could have a lease?

A. He had; while he said he would talk with Gates, he practically intimated I could have 50 and 60.

Q. It was a lease of ground claimed by Gates?

A. I don't remember his ever telling me I could

(Testimony of John J. Ford.)

have the lease, he said he would have to see somebody, it seems to me it [65-42] was Gates.

Q. And he afterwards told you you could have the lease?

A. I don't recollect Dud ever telling me that or having seen him.

Q. I understood you to say he told you you could have the lease—which was it?

A. It was that day, I might have a lease of One and Three Below, which he professed to own, he and Schultz; I told him it was One and Two, what afterwards proved to be Discovery and One—that was the best ground on the creek.

Q. You wanted One and Two and he told you you could have One and Three?

A. I wanted Discovery and One—it proved to be Discovery and One, but at that time I thought it was One and Two.

Q. That is what you wanted?      A. Yes.

Q. Did that ground which you wanted include the ground which you afterwards located as the Surprise Fraction?      A. No, it did not.

Q. You didn't have that particular piece of ground in mind when you asked for the lease?

A. No. I would have been glad to get any of that for that matter.

Q. Did you trace out the monuments on these claims there that you spoke of as Number One and Two, on the claims above where you located the Surprise Fraction?

A. Why, I did not see any monuments there, only



(Testimony of John J. Ford.)

this one that was kicked over here.

Q. What I mean by that is this—You know the claims up the creek were located and claimed by people, Discovery and [66-43] Number One and Two? A. Yes.

Q. Did you go around and try to locate their monuments and trace out their ground from them?

A. I tried to get all the information I could as to who owned the ground by looking at the monuments.

Q. Did you try to ascertain the boundaries of the different claims?

A. My first knowledge was the centre end stake of Number One Above and that showed me that this must be discovery—that is the first time I knew it was Discovery.

Q. Did you go around then to find the monuments of Discovery?

A. There was no monuments, only two little willow stakes; they never put up any centre end or nothing—it is a bare country.

Q. They were located a couple of months prior to that time?

A. They were located on July 3d and we located August 30th.

Q. Speaking of Discovery claim on Eldorado—

A. I don't know when that was located.

Q. It was located a couple of months prior?

A. I should say so.

Q. One of the first claims located in the country?

A. It must have been.

Q. The markings on these monuments would

(Testimony of John J. Ford.)

probably be more or less obliterated?

A. If it was on a board or can it is good for two years.

Q. I am speaking of the markings on the corner mounments? A. Yes, a little.

Q. Did you go around to see them?

A. Yes, there was willow stakes up and down there. [67-44]

Q. On what claims? Discovery?

A. I went over Discovery—I never could find anything on Discovery.

Q. Did you examine Number One Below Discovery—did you examine the monuments?

A. I examined the monuments.

Q. The monuments of McKinney? A. Yes.

Q. You traced those out, did you?

A. Here was the creek, running down the stream and there was a bank on each side; it was easy to trace it. If I found a monument here that said down stream, why I would walk down to the next monument and knew it was located.

Q. You knew the Discovery claim on Eldorado was claimed by Mr. Nels Nelson?

A. I didn't until afterwards.

Q. After what time?

A. When I was working on the Surprise Fraction one day—when I was working there.

Q. After you had made the location of the Surprise Fraction? A. Yes, sir.

Q. Before you located the Surprise Fraction did you undertake to trace out the claims above it and

(Testimony of John J. Ford.)

find out who owned them and the boundaries of them?    A. I did, yes, sir.

Q. What did you do to that end?

A. I went to the initial monuments each way, went to two of them up here; the notices were missing but I saw McKinney's notice here on Number One.

Q. Claiming Number One Below? [68-45]

A. Yes, sir.

Q. And you also saw the notice on Discovery?

A. Well, I saw Nelson's notice here, A. F. Nelson.

Q. That is on Number One?

A. He was claiming One up stream, up this way.

Q. You knew that A. F. Nelson was a jumper as it is called in the locality—he had staked ground previously claimed by some one else?

A. I knew he was a second locator in there.

Q. You know that he had attempted to locate disputed ground?    A. I certainly did.

Q. And you knew that the first attempted location at least was made by Mr. Nels Nelson on Discovery and by Mr. W. E. McKinney on One Below?

A. I don't know who located Discovery only Mr. James' men or somebody told me he had located it—that is how I found out it was his claim.

Q. You didn't make any attempt to find out who had located Discovery on Eldorado Creek?

A. I can show you notes I made; One Above and Discovery seemed to be the same claim and I decided that One Below and Discovery was the same claim until I found the centre end stake and then I could check it over readily.

(Testimony of John J. Ford.)

Q. You obtained the position of the Discovery claim?

A. I did, yes.

Q. And then you, of course, knew that Number One Below Discovery must be below that on the creek, did you not?     A. I did.

Q. And then you knew that Number Two Below must be below that, did you not?

A. It should be below it.

Q. Did you take any steps to ascertain whether these three [69-46] claims could exist in there, whether there was ground enough for them as claimed?

A. I knew, I am not attempting to say I did not know anything like that—I know if the creek had been staked properly, knew afterwards, that this would be Number Two.

Q. As a matter of fact, didn't you know if the creek was staked properly it would be Number Two, —didn't you know that before you made your attempted location on August 30th?

A. No, I had not figured it out, about it then.

Q. Do you mean to say that you went ahead and made the location there without figuring out the boundaries above it?

A. This is the only ground that we thought was in question, here (indicating) —we couldn't find any monuments or anything about it.

Q. Did you assume then that the Number Two and Number One and Discovery were all above it?

A. At that time?



(Testimony of John J. Ford.)

Q. Yes, at the time you had made that location, August 30th?

A. No, I think I assumed as I remember, I am sure I did, that McKinney had staked down stream, calling it Number One and Gates had staked up stream, and called it Number Two.

Q. As a matter of fact didn't you know before you made that attempted location on August 30th, that that ground was actually being claimed by a prior locator?

A. No, I did not—I didn't know whether it was or was not being claimed.

Q. You didn't know whether it was or not?

A. No.

Q. Didn't you understand that the entire distance of Eldorado Creek was staked and claimed? [70-47]

A. Certainly, every creek in there. .

Q. And you didn't attempt to go and determine the length of the claim known as Discovery on Eldorado and Number One Below and Number Two Below, did you?

A. I didn't attempt to ascertain the length of them?

Q. Yes—did you attempt to do so, to ascertain where their position might be?

A. Yes, I know the length of them.

Q. Then you must have known from that that Number Two would have to extend right down on this very ground you were locating?

A. If Number Two were staked properly I sup-

(Testimony of John J. Ford.)

pose that would be number Two.

Q. Then as a matter of fact you located because you thought there had been an error made by Gates in his description of the location?

A. There wasn't a location on there; his stake read up stream and there wasn't a stake on there and there wasn't a sign of a shovel.

Q. There were four willow stakes, you say?

A. Unmarked—those were McKinney's stakes, here and there.

Q. They were unmarked?

A. They were unmarked.

Q. Were they blazed on the sides at all?

A. A little on two sides.

Q. Was there any mark on this whittled space?

A. Not to my knowledge, no.

Q. Did you examine them carefully to see?

A. I looked them over carefully.

Q. You knew the original discoveries had been made there a [71-48] couple of months before and they had a very rainy summer and you would have to examine those stakes critically to read the markings two months later?

A. You can take it from me there was no mark—I examined them carefully—that there wasn't a lead pencil mark on them or anything do you mean?

Q. Yes.

A. There might have been a lead pencil mark on it or something indicating there was a side limit, there was nothing on them whatever on the fraction side here to show they were intended as a stake and

(Testimony of John J. Ford.)

I don't remember any markings on them and I made a memorandum in a book at the time there was no markings.

Q. Weren't you satisfied that those stakes were used by some one attempting to claim that particular piece of ground?

A. I am satisfied they were not.

Q. Why were you satisfied they were not so used, you say they were marked on two sides?

A. They would have been marked if they had been.

Q. You say they were whittled or blazed off on two sides?     A. Yes, sir.

Q. What was the purpose of blazing them off on the second side?

A. It is a custom, at least of mine—I usually whittle them on four sides to make them plain, so a person can see it.

Q. You whittle them on four sides and write on one?     A. That is all.

Q. As a matter of fact it is quite common to establish common end line stakes, that is where two use the same stake as the lower stake for one claim and the upper stake for another—I am referring to the side, the right and left limit [72-49] stake and center end?

A. I have never seen it done by miners—they always put in two stakes.

Q. They put in separate stakes?     A. Yes.

Q. How about center ends, is it customary to use a common stake there?

(Testimony of John J. Ford.)

A. For one center end?

Q. Yes.

A. Not to my knowledge, it is not—I always understood the center end was not absolutely necessary.

Q. You say that you noticed Mr. McKinney's notice claiming down stream 1300 feet for One and also noticed Gates notice for Purdy claiming up stream?

A. That is my recollection of McKinney's and certainly I read Purdy's and Gates' and it certainly read up stream.

Q. Did you measure the distance between those two notices?     A. About 1300 feet.

Q. You knew it was about the distance of one claim?     A. Yes.

Q. Did it ever occur to you that it must be a mistake in that notice of Purdy's in claiming up stream?

A. Here was the question in my mind, that I didn't know whether he had relocated this ground up here or whether he had put this in here intending to locate down stream and located up stream—I am not a mind reader and didn't try hard to solve that problem.

Q. As a matter of fact did you notice the dates on these notices of McKinney and Gates?     A. I did.

[73-50]

Q. What was the date?     A. July third.

Q. On both of them?     A. On both of them.

Q. Were both in the same handwriting?

A. Every notice up and down that creek looked to me to be the same handwriting—I am not an expert.



(Testimony of John J. Ford.)

Q. Were they witnessed by the same witnesses—did you notice the names of the witnesses?

A. There was no witnesses.

Q. However, you knew they were signed on the same date?     A. Yes.

Q. The dates read the same?     A. Yes.

Q. Now, then, wasn't it manifest to you that there was evidently a confusion of some sort there?

A. There was confusion on the ground?

Q. Yes—there must be confusion or a mistake of some sort?

A. Yes, there was a confusion—I don't know what you mean by confusion.

Q. Here were two notices put up the same date by men apparently going out there together, and they are 1320 feet apart, and one claims that distance up stream and the other 1320 feet up stream—you knew there was something wrong about it, didn't you?

A. There was a muddle here on those claims.

Q. You knew there was a muddle?     A. Yes, sir.

Q. Now, the point I make is this, you observed a number of claims there on the creek? [74-51]

A. I observed a number of claims on the creek.

Q. You knew there wasn't room for three full claims, that is Discovery and One Below and Two Below between the original discovery, including the original discovery claim and the fraction you were attempting to locate?

A. I don't know whether I knew that at that time

(Testimony of John J. Ford.)

or not, I knew it afterwards, when I found where Discovery was.

Q. Before you located did you measure up stream and attempt to see?

A. It was not necessary.

Q. Did you do so?

A. If I measured up stream?

Q. Yes, to see if those claims could be full size and could exist there, or anything like full size?

A. Yes, I did.

Q. What did you learn?

A. I learned that they were a little bit short.

Q. You learned that they were short. How far up did you measure?

A. I think we measured, we did measure what is Discovery now and what is One and Two Below now and what is Three Below now and the Surprise Fraction.

A. Three Below—you mean ground below the ground you located as the Surprise Fraction?

A. Yes.

Q. My question goes only to the ground that you measured above the ground you located, above the ground located as the Surprise Fraction. Now, did you get the distance between that and the Discovery claim?

A. Why, I got the distance of the claims, each one, yes, but I [75—52] didn't know where Discovery was at that time.

Q. You knew where Number One was of McKinney's?

(Testimony of John J. Ford.)

A. I knew what McKinney claimed for Number One, yes.

Q. And you saw Mr. Purdy's notice down at the lower end of that very same claim, didn't you?

A. I did.

Q. And claiming up stream, you say?

A. Yes, sir.

Q. Then you knew there would be a conflict between Purdy's notice and McKinney's notice, did you not—you knew there must be a conflict?

A. I didn't think both of them could own the ground.

Q. You knew there were staked by the same party on the same day?

A. That is the way the notice read.

Q. You knew there must be an error of some sort?

A. Whether it was an error or a deliberate blanket I didn't know.

Q. What do you mean by that? Do you think the two men are likely to locate the same claim, going out together on the same day? Or did you make any inquiry to see what actually occurred?

A. There was no one I could inquire of.

Q. You knew McKinney—did you ask him what the situation was? A. I did not.

Q. Did you ever call his attention to the fact, before you made the location there, that there was an apparent conflict of location notices and wanted him to explain?

A. No, he would go over and locate it himself if I did and beat me to it.

(Testimony of John J. Ford.)

Q. You knew as a matter of fact that they were at least attempting [76—54] to claim that ground and you wanted to get in ahead of them if you could—that is what you were trying to do?

A. Until McKinney came over there I didn't know they were attempting to claim the ground, didn't know whether they were attempting to claim the ground or not; they had no sign that they were attempting to claim it and I had no reason to know and no line to find out what they were doing when they put the notice in.

Q. What I am getting at is this—Didn't you, as a matter of fact, before you located the Surprise Fraction placer, know that the same ground was actually claimed or being attempted to be claimed by Purdy through Mr. Gates?

A. All I had was the notice and that didn't show it.

Q. Didn't you have any other intimation that they were claiming it?

A. The only intimation I might have had would be the conversation with McKinney that he didn't own Two Below.

Q. You were satisfied when you made that location or attempted location on August 30th that you were jumping another man's ground?

A. Certainly not.

Q. You were not?      A. No.

Q. You were satisfied you were locating ground another man was asserting a claim to, whether it was a rightful claim or not, were you not?



(Testimony of John J. Ford.)

A. I don't see how I can answer that question in the way you put it, that I knew they had that ground staked.

Q. You knew they were asserting a claim to it of some sort?

A. No, I didn't know for sure what they were claiming. [77—55].

Q. You say you didn't know for sure; what do you mean by that?

A. What I knew was this, if those gentlemen did stake the creek they would probably all go together up and down there.

Q. You knew they were over there first before there were many people in the country—you didn't regard it as probable that they would leave a 1300 feet fraction there?

A. That they would leave it open intentionally?

Q. Yes.

A. I don't believe they would intentionally.

Q. You were satisfied of that when you went there and were satisfied they intended to stake it,—the original men up there had intended to stake it at least?

A. They intended to stake it or left it open for one of their party to stake later and he hadn't shown up; they had lots to look after those days, they had other grounds keeping them busy.

Q. Did McKinney and Gates have any other ground? Did you know of any other ground they had?

A. Why, I know they have other ground in there.

(Testimony of John J. Ford.)

Q. As a matter of fact they were working for wages for James?

A. I have no knowledge of what McKinney was doing of the work on Bonanza.

Q. I am asking you if you didn't know; if you didn't see McKinney and Gates working up there for James on his ground?

A. I don't remember having seen Gates there; I did see McKinney working on Bonanza; I thought it was his own ground—I knew he had bench ground there.

Q. About those stakes you saw—you found a willow stake near every corner of this ground you staked as the Surprise Fraction? [78—56]

A. I found a willow stake at each of these corners.

Q. As they are now marked? A. Yes, sir.

Q. And you say that stake is blazed or hewn out on two sides?

A. Yes, it was whittled on two sides—it might have been only one.

Q. You are not positive whether it was marked there or not?

A. There was no markings on it to indicate it was a corner stake.

Q. Were there any markings on it at all?

A. There wasn't to my knowledge.

Q. Didn't you examine it to see? A. Yes.

Q. Will you swear positively it was not marked?

A. I think I could swear positively it was not marked; there might have been a pencil marking, one word or something, but to the best of my knowl-

(Testimony of John J. Ford.)

edge there wasn't a mark on one of those stakes.

Q. Sutherland was with you at that time?

A. He was up there.

Q. Did you call his attention to the stake and ask him to look at it and see what marks were on it?

A. Dan went over all the stakes about the same time I did.

Q. Now, further about this conversation you had with McKinney. You say that was about four days prior to the time you staked this placer ground?

A. That is the best of my recollection.

Q. Where was that conversation?

A. I went over to Bonanza and I think it was Schultz I met first, and I think, my recollection is, we went down to [79—57] James' ground; I know we found McKinney in there somewhere and that was the day I had the talk with him.

Q. Was anyone else present at that conversation?

A. Not to my knowledge excepting Mr. Schultz and I don't know that he overheard it.

Q. What were you told about Purdy that day?

A. Purdy's name was never mentioned as far as far as I know.

Q. Wasn't Gates' name mentioned?

A. That I am not certain about—when I asked McKinney for a lease on One and Two Below he told me there was another party owned Two Below, but as I remember they were interested in some way or other and he thought that it could be fixed.

Q. You don't know whether he mentioned the name of Purdy or Gates?

(Testimony of John J. Ford.)

A. I am sure he didn't mention Purdy—he might have mentioned Gates's name.

Q. He said he would have to see somebody?

A. Yes.

Q. When did you first meet Gates?

A. I don't know that I have ever met Gates; I asked McKinney—I wanted to meet him, but I didn't meet him.

Q. Before you staked the ground you saw this location notice with Purdy's name, did you not?

A. The first thing I did when I went down there with Sutherland was to read that notice.

Q. It was signed F. W. Purdy by G. L. Gates, attorney in fact?

A. Locator F. W. Purdy, G. L. Gates, attorney, if I remember.

Q. Then did you call to see Gates and McKinney in regard to the confusion of the lines there? [80—58] A. I had it in mind to.

Q. Did you do so?

A. McKinney came over the next day and I saw it wasn't necessary—I don't say it wasn't necessary because I asked McKinney and told him, "I wish Gates would come over, if Gates is an honest man and looks this over we won't have any trouble about this ground," and McKinney said something about Gates being sick that day and me taking advantage of his sickness.

Mr. LEEHEY.—That is all.

By the COURT.—It is now time for the noon recess. On this matter of the objection and the ruling



(Testimony of John J. Ford.)

I made in regard to notices on the ground adjacent or adjoining this claim, I am not altogether satisfied and if you think it is important, I will hear you at a quarter to two. The strict rule of evidence probably would not make it competent to show what somebody else did.

Mr. RITCHIE.—I think counsel on the other side misconceived our purpose. The only purpose was to show this as a circumstance,—that would have a tendency to show that that was unoccupied and unappropriated domain at that time.

WHEREUPON court took a recess to 2 P. M.

#### AFTERNOON SESSION.

JOHN J. FORD.

Redirect Examination by Mr. DONOHUE.

Q. On your cross-examination the question was asked you regarding how many claims you and your co-owner located in the Shushana region last year—I will ask you to state how many claims you located?

A. Four and a quarter. [81—59]

Q. Name those claims.

A. Number Two Bear Pup.

Q. In whose name was that located?

A. Dan Sutherland. Number Two Above on Big Eldorado; Joe Clark and I got our names on that together; Joe Clark had a half interest, and Smith and partner have another interest, a half interest; Granite Pup Number 1, I located that for Robert Smith,—he had gone to McCarthy for grub.

Q. He was one of your party? A. Yes, sir.

Q. What was he doing at the time?

(Testimony of John J. Ford.)

A. He took out two horses and went to McCarthy for more supplies.

Q. What other claims?

A. The Surprise Fraction.

Q. You were there from about the 16th or 17th of August to the 18th of December?     A. Yes, sir.

Q. And all the claims your party acquired there was  $4\frac{1}{4}$ ?     A. Yes, sir.

Q. Acquired by location?     A. Yes, sir.

Q. That was for all of you?

A. That was for the three of us.

Mr. DONOHOE.—That's all.

(By Mr. LEEHEY.)

Q. Did I correctly understand you to say that you located Two Above on Eldorado Creek?

A. Yes, sir.

Q. That was claimed by a previous locator?  
[82—60]

A. I think I told you so this morning, yes, sir.

Q. Were any of those other claims located or attempted to be located prior to your location?

A. Why there was a bench on Wilson Creek that had run out,—they hadn't done the work on that; the ninety days had gone by, and they hadn't put it on record. I don't think it amounted to anything. We relocated that.

Q. It was previously located?     A. Yes, sir.

Q. In whose name was Number Two Above on Eldorado taken at the time of your location—was it in your name?     A. Joe Clark.

Q. Was that the one Joe Clark was in?

(Testimony of John J. Ford.)

A. Yes, sir.

Q. Do you know who was the previous locator of that ground?

A. I have a note in my pocket— It was J. P. McClain, acting under power of attorney for one M. Lamb.

(By Mr. DONOHOE.)

Q. Did anybody ever make any contest over this location of yours on Number Two Above on Eldorado?

A. No, sir; they never showed up and never did any work.

Q. As far as you know nobody was claiming it but yourself and Clark? A. No.

Q. Regarding this claim on Wilson bench, did you ever perfect that location?

A. On the Wilson bench, yes—we did our work there.

(By Mr. LEEHEY.)

Q. Did you bring suit on that claim, Number Two Above, on Eldorado? [83—61]

A. There was no suit to bring, no.

Q. How do you know there was no suit to bring?

A. Because they hadn't done the work.

Q. That is your assumption?

A. No, that is the truth, they hadn't shown up.

Q. Do Mr. McClain and Mr Lamb, for whom he located, admit that?

A. I don't know where they are; I rather think they did.

Q. They didn't admit it to you?

(Testimony of ohn J. Ford.)

A. I never met them.

Q. That is your assumption, that they have no claim to it?     A. It is simply what Clark said.

Q. It was located before the territorial law went into effect?

A. All I have is Clark's word for that.

Q. And they didn't do any work on it until the first of January?     A. They did not.

Q. And you left there in December?

A. The 18th of December.

Q. And you have no personal knowledge whether they did any work on it or not?

A. They hadn't, up to a few days before that—there was snow and solid frost and it is not likely.

Q. Is that the only reason for locating, because they hadn't done the work?

A. My reason was because Clark came down and asked me if I wanted to stake a claim.

Q. You knew at the time it was a claim that others were already claiming?     A. Yes, and I told Joe so.

Witness excused. [84—62]

**[Testimony of Dan D. Sutherland, for Plaintiff.]**

DAN D. SUTHERLAND, the plaintiff, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination by Mr. DONOHOE.

Q. What is your name?     A. Dan D. Sutherland.

Q. You are the plaintiff in this case?     A. I am.

Q. How old are you?     A. Thirty-one.

Q. How long have you resided in Alaska?

A. About four years.



(Testimony of Dan D. Sutherland.)

Q. What has been your business or occupation since residing in Alaska?

A. I worked for the Road Commission and prospecting.

Q. Where were you prospecting?

A. Around Valdez, and last Summer in the Shushana.

Q. Where were you in the latter part of June and part of July last year?

A. I was working for the Alaska Road Commission

Q. Where?     A. At Teikhell.

Q. You and Ford went into the Shushana together?     A. We did.

Q. When did you start for the Shushana from Teikhell?

A. I think about the 6th—we left McCarthy on the 8th of August.

Q. What time did you arrive in the Shushana region?

A. We got in there around the 18th, the 17th or 18th of August.

Q. There were three of you, yourself and Ford and Smith?     A. Yes.

Q. Were you upon Big Eldorado Creek about the 30th of August? [85—63]     A. I was.

Q. Did you make a location of the ground in controversy in this case known as the Suprise Fraction?

A. I did.

Q. When did you first start to initiate that location?     A. On the 30th of August.

(Testimony of Dan D. Sutherland.)

Q. What was the first act you did towards locating that claim?

A. Well, I was down at the lower end and I looked for some monuments there and couldn't find any; there was only two monuments there at the lower end, that was at the upper end of Three.

Q. That was the lower end of the Surprise Fraction and the upper end of Three as shown on exhibit "A"?     A. Yes, sir.

Q. What monuments were they?

A. There was one for Schultz by McKinney describing the claim down the stream. Number Three and the other was for Richard Bell.

Q. How was it describing the claim?

A. 1320 feet down the stream, Number Three Below.

Q. Was there any other monument there at this upper end of what is now the Surprise Fraction?

A. No, there was not.

Q. Where did you go from there?

A. I went further up the creek.

Q. How far up?     A. I went up to Number Two.

Q. How did you know you arrived at the end of Number Two?

A. Well, I read Mr. Purdy's location.

Q. How did Mr. Purdy's location describe the claim? [86—64]

A. Running 1320 feet up stream, by Gates as attorney.

Q. What other notice did you find there, or monument?

(Testimony of Dan D. Sutherland.)

A. There was a monument there, the notice of A. F Nelson.

Q. How did it describe the claim?

A. The same ground, claiming 1320 feet up stream.

Q. Was Mr. Ford with you at that time?

A. No, he was not.

Q. Later, did Ford join you?      A. He did.

Q. And what did you and Mr. Ford do, if anything, towards making a discovery?

A. Well, we were working on location work on Two Above.

Q. You were doing location work on Two Above?

A. Yes.

Q. Did you and Ford then determine on what is now the Surprise Fraction?

A. Yes, I went up and told him there was either a claim there or a big fraction, so we went down and read Purdy's notice first.

Q. Ford read it with you?      A. Yes, he did.

Q. What did you and Ford do then, together?

A. Then we read Nelson's

Q. That was the upper end of the Surprise Fraction?

A. That was the upper end of the Surprise Fraction.

Q. And at the lower end of what is marked on exhibit "A" as Number Two Below?      A. Yes.

Q. What did you do after that?

A. I went down the creek, the left limit, and Ford went down [87—65] the right limit, to see if there was any work or any stakes that I possibly over-

(Testimony of Dan D. Sutherland.)

looked coming up.

Q. Did you see any signs of work or any stakes going down?     A. Nothing.

Q. What did you and Ford do after that?

A. We went down to the lower end of what is the Surprise Fraction now, the upper end of Three, and we read Schultz location by McKinney.

Q. Did you read R. Bell's location, too?

A. Yes.

Q. Then what did you do, go up the creek further?

A. We paced it back up the creek.

Q. Up to Purdy's location notice?     A. Yes.

Q. What did you do next?     A. After pacing it?

Q. Yes.

A. Well, we took a pick and shovel and went down about possibly 60 or 70 feet below the location monument.

Q. Down below whose location monument?

A. Below Purdy's; and on account of a depression in the bank we dug in there a couple of feet or so and found prospects.

Q. What else did you do in the way of prospecting?

A. Well, we took two or three, possibly three or four pans there, and went up then probably ten feet of the location monument, within probably ten feet of the location monument.

Q. Did you do some prospecting there?

A. We did.

Q. You panned the gravel, did you?

A. Yes. [88—66]



(Testimony of Dan D. Sutherland.)

Q. What was the result of your panning?

A. Well, we got some pretty fair prospects there and lots of black sand.

Q. What did you do next?

A. I started to build a monument pretty near on a direct line or a little below Purdy's the Nelson and Purdy monument was pretty near in a line and we set ours over on the left limit.

Q. You erected your monument a little down stream from the Purdy monument?

A. Yes, a little.

Q. About how far?

A. Not very far, probably a foot, I guess hardly that.

Q. What did Ford do about that time?

A. He went down the creek and put up the lower center end.

Q. What did you do after Ford left?

A. I built a monument.

Q. What else?

A. I built a monument, and then I wrote the location notice.

Q. After you had the location notice written, did Ford join you?     A. He did.

Q. What did you do with the location notice after you had it written?

A. I put it under a flat rock on the top of the monument.

Q. You put it under a flat rock on top of the monument?     A. Yes, sir.

Q. What was that location notice written on?

(Testimony of Dan D. Sutherland.)

A. Written on a printed form, a small form.

Q. Was any portion of it visible after you put it under the [89—67] flat rock?

A. There was a corner of it.

Q. I now hand you a paper and ask you to state what that is.      A. That is the same form.

Q. That is the writing?      A. Yes, sir.

Q. That is a true and correct copy of the location notice you posted there at that time?      A. Yes.

Mr. RITCHIE.—We offer this Notice of Placer Mine Location in evidence as Plaintiff's Exhibit "B" and I desire to read it to the jury.

Admitted as Plaintiff's Exhibit "B" and read by Mr. Ritchie, as follows:

**"NOTICE OF PLACER MINE LOCATION.**

Notice is hereby given that the undersigned, a citizen of the United States, over twenty-one years of age, has, on this 30 day of August, 1913, located a placer mining claim, of 19½ acres, more or less, situated in the White River mining district in the Territory of Alaska, and more particularly described as follows, to wit:

Commencing at this initial monument and running down stream 1300 ft. by 330 ft. on each side of this monument, claim to be known as Surprise Fraction, situated between A. F. Nelson's No. 2 Below Big Eldorado claim, and R. Bell No. 3 below, claim beginning at this initial monument and running 1300 ft. down stream northwesterly to senter end, and 330 ft. on each side of monument, corners marked by four willow posts, and

(Testimony of Dan D. Sutherland.)

that I intend to hold and work the same according to the laws and local rules and regulations.

Date of Discovery, Aug. 30.

Date of location, Aug. 30.

DAN SUTHERLAND,

Locator.

Witnesses:

JACK J. FORD."

Q. Now, was that all you did that day toward perfecting this location?     A. Yes, that was all.

Q. And you went back to camp?     [90—68]

A. Yes.

Q. When did you next return to this ground?

A. The next morning.

Q. What did you do next morning toward finishing your location?

A. Why, we cut some stakes coming up.

Q. Coming up from where?

A. Coming up from the camp on Bonanza.

Q. How far was that camp from this property?

A. Well, I should say it would be about two and a half or three miles over the hill.

Q. What did you do?

A. We cut a couple of stakes coming up, and there was a couple up there at Number Two, and we got up to the claim and I started up on the left limit and paced of 330 ft.

Q. You started up on the life limit?

A. Yes, sir.

Q. From what point?

A. From our location monument, and I put in a

(Testimony of Dan D. Sutherland.)

corner post there and called it Number 4 of the Surprise Fraction, and the date of the location, and I put an arrow on the inside, pointing down the stream 1300 feet, and an arrow pointing toward the center monument 330 feet.

Q. At that corner, before you erected the corner stake, did you observe any stakes in that immediate vicinity?     A. Yes, there was.

Q. State what those stakes were.

A. There was one stake there, a spruce stake by Nelson, claiming up stream, or he had an arrow pointing up stream.

Q. Did Nelson claim for himself?

A. He was attorney in fact for Shade. [91—69]

Q. What other stake did you see there?

A. There was a small willow stake there with nothing on it.

Q. Where did you go from that point?

A. I went from that down to the lower center end.

Q. What did you do when you arrived at the lower center end?

A. I paced 330 feet up from the lower center end monument and placed a stake there.

Q. Where?

A. I paced from the lower center end monument 330 feet up on the left limit and put a stake in there and called it the Number 3 corner stake of Surprise Fraction and the date and the locator and I had two arrows on it, one pointing toward the center monument, lower center end, 330 feet and an arrow pointing up stream 1300 feet.



(Testimony of Dan D. Sutherland.)

Q. What did you discover at or near that point in the way of stakes?     A. There was two stakes.

Q. What markings on them?

A. One was Richard Bell's claiming Number Three Below down stream, 1320 feet down stream.

Q. What was the other stake?

A. The other stake, there was nothing on it.

Q. What sized stake was it?

A. It was a stake probably an inch and a half in diameter.

Q. How high?     A. Three feet, probably.

Q. How high was the stake you put in?

A. The stakes would be about four feet.

Q. And about what was their diameter?

A. Probably two inches and a half—they were willow stakes. [92—70]

Q. After you put in that corner post at Number 3, what did you next do on the claim?

A. I came back down to the monument, the lower center end monument.

Q. What did you do there?

A. And I met Mr. Ford there and we went up the creek to where we had made the first discovery the day previous and we started on our location work.

Q. At that time and up to that time, did you discover anything in connection with that piece of ground now covered by the Surprise Fraction that would lead you to believe that that ground had been previously located?

Mr. LEEHEY.—We object to that as calling for a conclusion of the witness.

(Testimony of Dan D. Sutherland.)

Objection sustained; plaintiff allowed an exception.

Q. Did you find any evidence of any work being done upon that ground in the way of mining or prospecting previous to your location? A. I did not.

Q. Did you have occasion that day to visit the two corners on the right limit? A. Not that day.

Q. You testified that you and Ford went up to where you first made the discovery, and went to work? A. Yes, we did.

Q. How long were you working that day, the two of you?

A. We worked about five hours, I guess, until about half past four.

Q. And then went back to your camp?

A. Yes, sir. [93—71]

Q. When did you next return to the property?

A. The next morning.

Q. And who accompanied you that day?

A. Why, Judge Tucker and Mr. Ford.

Q. What did you do that day towards completing your location or otherwise?

A. Well, in fact I didn't do much that day at all.

Q. Did you see Judge Tucker or Mr. Ford put up any stakes?

A. I did, I helped Mr. Tucker line the last side-line stake.

Q. On what limit?

A. That was on the left limit; I was delayed coming down because I was on the trail of some caribou and arrived on the property somewhat late.

(Testimony of Dan D. Sutherland.)

Q. Some time after Ford and Tucker arrived?

A. Yes, sir.

Q. Did you do any work that day?

A. No, I did not.

Q. Did you see anyone put in the side-line stakes on the right limit?

A. Jack Ford was up there—he was putting in the side-line stakes,

Q. You didn't return to the property the next day, did you?     A. No, I did not.

Q. How long was it before you returned to the property again?

A. I think it was on the third of September.

Q. Did you meet McKinney there that day?

A. I did.

Q. Did you have any conversation with him regarding that property?

A. Yes, I did. [94—72]

Q. State the conversation as near as you can remember it.

Mr. LEEHEY.—We object to any conversations with McKinney not in the presence of this defendant or Gates as incompetent, irrelevant and immaterial and not binding upon the defendant.

Objection overruled; defendant allowed an exception.

A. Why, I was down to Wilson that day and was coming up the creek, Big Eldorado, and before I got up to where we had worked before that on our location work, I seen a couple of men working in the bench on the right limit.

(Testimony of Dan D. Sutherland.)

Q. That was within the lines of the Surprise Fraction?     A. Yes.

Q. Who were those men?

A. Why, I found out later it was McKinney—I didn't know the other man.

Q. You had never met McKinney previous to that time?     A. No.

Q. Did you and McKinney have a conversation there about that time?

A. Why, I could see where we had been working on our location work in the creek and I asked him if he had seen Ford and he said he had some time that day.

Q. What conversation was had regarding the claim at that time?

Mr. LEEHEY.—This goes in under the same objection and subject to the same exception?

By the COURT.—Yes, sir.

A. McKinney told me that Ford had told him that he had staked a fraction there, a 1300 feet fraction and he said that was impossible, or he said his partner had, and I told him I was the one that made the location. [95—73]

Q. What further conversation took place?

A. He said it was impossible and he said the location notice had been moved from the upper end of Three and he gave me an idea how he thought it was moved, he said that probably the wind blew the board off the monument and the squirrels had packed it up the creek a little ways and somebody coming up the creek seen the notice and packed it up to Two.



(Testimony of Dan D. Sutherland.)

Q. You mean to the upper end of the claim?

A. I mean to the upper end of the claim, or Two.

Q. What did McKinney state to you, if anything, as to where that notice originally was posted?

A. He told me that on that morning he had moved the notice before witnesses and before Mr. Ford down to its original place on Number Three.

Q. Down to the upper end of Number Three?

A. Yes.

Q. That would be at the lower end of what is known as the Surprise Fraction shown on Exhibit "A"? A. Yes, sir.

Q. Did you have any further conversation with him about the property?

A. No, I don't remember of anything more—we might have had a few more words, I can't think of them now.

Q. What did you do the rest of the day?

A. I went up and went to work.

Q. Where?

A. Ford was working in the cut in the creek and I went to work in the creek, in the cut with him.

Q. How long did you work there that day?

A. Until about five o'clock. [96—74].

Q. When did you go on the property again?

A. I went up there either on the 5th or 6th—I wouldn't be positive of the date.

Q. What did you do that day?

A. Worked in the bench.

Q. In the cut? A. Yes, sir.

Mr. LEEHEY.—The defendant will admit that

(Testimony of Dan D. Sutherland.)

the testimony of Mr. Ford is sufficient evidence of the necessary location work having been performed.

Q. Did you later on file a certificate of location after the assessment work, after the location and assessment work had been done on the property?

A. I did.

Q. I hand you a paper and ask you to state if that is the certificate of location which you filed and proof of doing the assessment work. (Handing witness paper.) A. Yes, that's it.

Mr. DONOHOE.—We offer this in evidence as Plaintiff's Exhibit "C."

Mr. LEEHEY.—The defendant objects to the introduction of this location certificate as incompetent, immaterial and irrelevant and more especially as not a compliance with the laws of Alaska in force on the date on which it is alleged this location was made and during the period involved in the testimony. I refer to the Act passed by the Territorial Legislature, approved April 30, 1913.

After argument—

(By the COURT.) I think this is a very complete document of its kind. It is not to be expected and never has been the case that miners going into a country, a new country, take lawyers and surveyors with them. It has always been held [97—75] that a substantial compliance in these matters is sufficient. I think as concerns the reference to some natural object or permanent monument or well-known mining claim that the objection is not well taken because it refers to this creek, Big Eldoraro

(Testimony of Dan D. Sutherland.)

Creek, a tributary of Wilson Creek, in the Chathenda Mining District, White River. Nobody can be mistaken. They can easily locate this stream and as to being between No. 2 Below and No. 3 Below, being designated by the names of the relocators—they may be as well known as the former locators, the names may be talked about a great deal. I don't think there could be any failure to identify this ground by this description and that is the purpose of any description, to identify it. Now, as to the description of the boundaries, corner monuments and markings thereof, the description here, while it is not set out affirmatively in technical language, it says, to wit: Commencing at the initial stake. If it were a monument, it would say stone monument, but it says a stake. Then it goes on, running thence 330 feet northerly to Stake No. 1. I think it can be presumed that stake was marked No. 1. It might be more positive to say Marked No. 1, but I think it would be going too far to hold that a location otherwise made in good faith, a valid location, could be nullified and forfeited by such a strict letter of the law and I feel constrained to overrule the objection.

Defendant allowed an exception to he ruling.

The Certificate of Location is admitted in evidence, marked Plaintiff's Exhibit "C" and read to the Jury by Mr. Ritchie, as follows:

#### CERTIFICATE OF LOCATION.

"This is to certify, That the undersigned, a qualified entryman [98—76] under the laws of the United States has located and does hereby

(Testimony of Dan D. Sutherland.)

claim the following described placer mining claim, to wit:

The name of the claim is Surprise Fraction. The name of the locator or the locators is Dan Sutherland. The dates of Discovery and the posting of the location notice are August 30 and August 30, A. D. 1913, respectively. Said claim is 1300 feet long and 660 feet wide. Said claim is located in the White River or Chathenda Mining District, Territory of Alaska, on the Big Eldorado creek, which is a tributary to and near to Wilson creek, and is further bounded by monuments, posts and corners, as follows, to wit:

Commencing at the Initial Stake and running thence 330 feet northerly to Stake No. 1; thence 1300 feet westerly to Stake No. 2; thence 330 feet southerly to lower center end; thence 330 feet southerly to Stake No. 3; thence 1300 feet easterly to Stake No. 4; thence 330 feet northerly to place of beginning. This claim is situated between A. F. Nelson's No. 2 below Discovery and Richard Bell's No. 3 below Discovery on said Big Eldorado Creek.

Location work has been done and performed on said claim equivalent to one hundred dollars at the rate of wages prevalent in the mining above named for the same kind of work, and the said work is described as follows, to wit:

The Construction of a cut 2 feet deep, 21½ feet wide and 45 feet long. Said cut is in the creek



(Testimony of Dan D. Sutherland.)

bottom about 75 *from* the initial Monument, down stream. Also another cut in the bank on the right limit of said creek about 125 feet from the initial monument 18 feet long; averaging 4 feet deep and 4½ feet wide. Said work was done and performed at the instance and under the direction of affiant for the purpose of improving the said claim in compliance to the laws regulating the location of mining claims in Alaska.

Dated Sept. 18, A. D. 1913.

DAN SUTHERLAND,  
Locator.

Subscribed and sworn to before me this 7th day of October, 1913.

[Seal]

J. J. FINNEGAN,  
Notary Public for Alaska.

My commission expires Aug. 19, 1917. [99—77]

Q. Did you cause that instrument to be recorded in the recording precinct of the White River recording district? A. I did.

Mr. DONOHOE.—You admit it is of record?

Mr. FINNIGAN.—Yes, sir.

Mr. DONOHOE.—It is admitted that the location certificate, Plaintiff's Exhibit "C," was duly recorded in Volume 6 pages 250 and 251 of the records of the White River recording precinct on October 7, 1913. Is that correct?

Mr. LEEHEY.—The defendant admits the record subject to the exception formerly made as to the sufficiency of the document recorded—as to its compe-

(Testimony of Dan D. Sutherland.)

tency and admissibility.

Q. Did you later and within ninety days from your location put any additional stakes upon this ground?   A. I did.

Q. Where did you place those additional stakes?

A. I put them on the four corners.

Q. What kind of stakes were they?

A. They were spruce stakes, about three inches in diameter.

Q. How high?   A. Four feet over the ground.

Q. Where did you get those spruce stakes?

A. Cut them down on Johnson.

Q. How far did you have to carry them?

A. Well, two miles, probably.

Q. Is this claim above timber line, this Surprise Fraction?   A. It is.

Q. Where did you place those new stakes?

A. Placed them at 4 on the left limit—

Q. Where did you place them on the corners with reference to [100—78] the first stakes you had up?

A. I tied them to the original stakes.

Q. What markings did you put on in regard to the corners, to the other stakes?

A. The same markings that were on the original stakes, the first stakes.

Q. Were these new stakes blazed?

A. They were, on four sides.

Q. Why did you put those spruce stakes in?

A. The willow stakes we thought were a little small.

(Testimony of Dan D. Sutherland.)

Q. When you staked this claim were there any spruce stakes you could have gotten in that immediate vicinity or any larger stakes than the ones you first used?     A. No; not for stakes.

Q. Those were the largest you could get then?

A. Yes, sir.

Q. And you put those spruce stakes in within ninety days from the time of your location?

A. Yes, sir.

Mr. DONOHUE.—That will be all.

Cross-examination by Mr. LEEHEY.

Q. You saw the stakes about this claim which you located as the Surprise Fraction before you made any attempted location of it, did you not?

A. Which stakes?

Q. The stakes that were at the different corners of the Fraction or what you call the upper corners of Number Three and the lower corner of Number Two?     A. I saw them there, yes. [101—79]

Q. You were at each of those corners before the 30th of August, 1913?

A. No, I can't say I was at the corners.

Q. Then you didn't see all the stakes, or do you know whether there were any stakes there then?

A. On the corners?

Q. Yes.

A. No, I wasn't to the corners before that date.

Q. Then as a matter of fact when you made the location on August 30, 1913, you didn't know whether the claim was staked or not?

A. Well, there was no location monument there in

(Testimony of Dan D. Sutherland.)

the creek on either end.

Q. Wasn't there a location monument at the lower end?

A. I mean taking in what is now the Surprise Fraction.

Q. Wasn't there a location monument at what you call the upper end of Number Three?

A. Yes, there was.

Q. And wasn't there another location monument at the upper end of this particular claim you staked as the Surprise Fraction? A. There was.

Q. There was a location monument at both ends?

A. Yes.

Q. Now, you saw the location notice of Purdy at the upper monument? A. Yes, sir.

Q. Right on the upper monument?

A. Right on the upper monument, yes.

Q. And that same upper monument, did it contain another location notice? [102—80] A. No.

Q. It was also used as a lower center end of the claim above it, was it not?

A. There was no other notice there on that monument.

Q. No other notice but that one?

A. That is all.

Q. And you determined that to be a location monument?

A. I did—there was a location notice written.

Q. Did you go to the corner, the upper corner on the right limit or where the upper corner should be placed, that is to say about 330 feet off to the right



(Testimony of Dan D. Sutherland.)

of the creek from that location notice?

A. Not that day.

Q. Did you at any time prior to August 30, 1913?

A. No, I did not.

Q. Then did you go to the corner on the left limit, about 300 or 330 feet to the left of that monument where you saw this location notice of Purdy?

A. No.

Q. You didn't go there either prior to the 30th of August?     A. No.

Q. So you made no investigation to see whether there were any stakes on this claim at those points prior to the 30th of August?     A. No.

Q. Now, did you go down to what is now the vicinity of your lower corner on the right limit before the 30th of August, 1913, to see whether there were any stakes there?

A. No, I did not. You are speaking of the corners now?

Q. Yes.     A. No. [103—81]

Q. Did you go to what is the vicinity of your present lower corner on the left limit on or before August 30, 1913, to see whether there were any stakes there?

Mr. DONOHOE.—These questions have been prior to the 30th of August and now counsel puts it on or before the 30th of August.

Q. Did you go to the corner, what is in the vicinity of your present upper corner on the right limit, on the 30th of August, to see whether there were any stakes there?     A. No, I did not.

(Testimony of Dan D. Sutherland.)

Q. Did you go to the same corner on the left limit on the 30th of August to see whether there were any stakes there?     A. No.

Q. Did you go to the vicinity of your present lower corner on the left limit on or before the 30th of August to see whether there were any stakes there?

A. No, sir.

Q. Did you go to the vicinity of your lower corner on the right limit on or before August 30th to see whether there were any stakes there?     A. No.

Q. Then when you made this location on the 30th of August, 1913, that is, when you posted this notice and proceeded to put up these monuments, you didn't know whether that ground was staked by some one else or not, did you, from your knowledge?

A. I did.

Q. How did you know if you hadn't been to the corners?

A. I went by the location on both ends of this fraction.

Q. Simply because that location notice said that they claimed [104—82] that many feet up stream, you concluded it was no use to see whether there were any location monuments that would conflict with the location notice, in other words you took the location notice for it?

A. At that time, yes.

Q. How was this location notice placed there when you found it the one claiming 1320 feet up stream and was at the upper end of your Surprise Fraction?

A. It was supposed to be a rock monument.

(Testimony of Dan D. Sutherland.)

Q. How was it placed?

A. There was a rock laid on top.

Q. It was flat on top of this rock monument and another stone on top of it?     A. Yes, sir.

Q. A light stone?     A. It was a flat rock.

Q. A rock a man could lift with one hand?

A. Easy.

Q. A rock one could throw a distance of several feet?     A. I don't know.

Q. You could lift it with one hand anyway?

A. Yes.

Q. Did you go upstream and undertake to measure or compute the length of that claim upstream 1320 feet?     A. Which claim?

Q. Which ever claim it was running upstream from the place where you saw this notice?

A. Yes, I measured that.

Q. What did you find at the upper end?

A. In the way of monuments?

Q. Yes. [105—83]

A. Found two monuments there.

Q. What was there at each monument, describe them?

A. There was one, the McKinney staking for Aleck Kingwall—

Q. You are speaking of the claim above where you located the Surprise Fraction?

A. Yes, and he was staking downstream, 1320 feet down the stream from that point.

Q. How many feet downstream from that point was it to where you saw this location notice of Purdy?

(Testimony of Dan D. Sutherland.)

A. It was short of a claim length.

Q. It was evident to you, was it not, that the claim which McKinney located for Kingwall was conflicting with the claim which Gates located for Purdy, if it was located as you thought it was from the notice?

A. How is that?

Q. It was evident to you if Kingwall's claim was 1320 feet downstream, and when you got down 1320 feet you came to a monument where Purdy's notice was claiming 1320 feet upstream, there must have been a conflict between them, or did you observe that?

A. It was a little short between the monuments I know.

Q. It was less than 1320 feet between them?

A. Yes.

Q. And one notice claimed that 1320 feet downstream and the other notice claimed the full distance upstream, did they not?     A. Yes.

Q. Didn't it occur to you there was a conflict between those two claims?

A. That is the way those location notices read.  
[106—84]

Q. Didn't it occur to you that there was a conflict between those two claims or did you notice that? Can't you answer whether you observed the conflict there or not?     A. I can't say I did.

Q. Did you notice the position of the Discovery claim on Big Eldorado Creek?

A. Well, I knew the position of what was supposed to be the Discovery claim.

Q. About how many feet was it from the lower end



(Testimony of Dan D. Sutherland.)

of that claim down to where you found this monument and Purdy's notice—from the lower end of the Discovery claim?     A. Well, about 1320 feet, I guess.

Q. And how did Mr. Kingwall designate his claim, what name was given to it?

A. Number One Below.

Q. That is the claim located by McKinney for Kingwall?     A. Yes.

Q. And how was Purdy's claim designated, the one located by Gates?     A. Two Below.

Q. And those two claims were in between the Discovery claim and this monument where you saw Purdy's notice, were they?

A. They were in between Discovery and what is now Surprise Fraction.

Q. And this monument where you found Purdy's notice is right on the line, the upper end of your Surprise Fraction, is it not?     A. It is.

Q. Now, then, did you know of Mr. Purdy claiming this ground that you staked as the Surprise Fraction?     [107—85]

A. Did I know of his claiming it?

Q. Yes.     A. No, I did not.

Q. Did you have no intimation of any sort that he claimed in conflict with McKinney and his client or his partner or principal?     A. No, I can't say I did.

Q. As a matter of fact, didn't you know that Mr. Purdy or Mr. Gates as his representative, was claiming that very ground that you staked?

A. No, sir; I did not.

Q. You are positive of that?     A. Yes.

(Testimony of Dan D. Sutherland.)

Q. Did you make any effort when you saw the apparent conflict in these location notices to hunt the matter up and find out how those claims lay?

A. Well, as far as the claim was designated, I did.

Q. What do you mean by that?

A. I mean the position of the stakes, to find out if there was any stakes on either end of the claim.

Q. You just told me you didn't go and examine any of those stakes, the corner stakes?

A. I said not on that date.

Q. When did you examine them at all? After the 30th of August, did you? A. No, I did not.

Q. So, as a matter of fact, you simply took this location notice for it, without ever going to examine the places where stakes should be to see if that Surprise Fraction, whatever ground you located as the Surprise Fraction, was otherwise [108—86] staked? A. Not before that date.

Q. Did you on that date, on August 30th?

A. I did.

Q. Did you go to each of these corners?

A. On the right limit I did.

Q. You did on the 30th of August go on the right limit?

A. I went down on the right limit of the claim.

Q. How far, to the right limit, to the extreme right limit of the claim?

A. I went down to the extreme right limit of the claim.

Q. Did you go to the vicinity of where you afterwards placed your upper corner on the right limit?

(Testimony of Dan D. Sutherland.)

A. Yes, I did.

Q. Did you go there on August 30th?

A. Yes, on August 30th.

Q. Did you on the same day go to the place where you afterwards placed your lower corner on the right limit?     A. I did.

Q. On the 30th of August?

A. On the 30th of August.

Q. Now, tell us what you found in the way of stakes in the vicinity of where you afterwards placed your upper corner on the right limit,—what stakes did you find there?     A. There was three stakes.

Q. Describe each stake and the markings on it.

A. One stake was a spruce stake, staked by Mr. Nelson for Shade.

Q. It was Mr. Shade's claim and Nelson was his attorney in fact? [109—87]     A. Yes.

Q. And that was claiming 1320 feet up stream?

A. He had an arrow pointing up stream.

Q. What was the next stake shown?

A. The next one was for a bench claim.

Q. That claimed a piece of ground lying away from the creek?     A. Yes, sir.

Q. What did the other stake show?

A. There was nothing on it.

Q. What kind of a stake was it?

A. A willow stake.

Q. How large?

A. It was a willow stake, probably an inch and a half thick.

Q. How high above the ground?

(Testimony of Dan D. Sutherland.)

A. Probably two and a half or three feet; it was chipped on two sides with a jack knife, flattened off on two sides.

Q. Was there any writing on those sides?

A. No, sir.

Q. Did you examine it carefully to see whether there was any writing?     A. I did.

Q. Are you positive there was no writing?

A. I am.

Q. Was the hewing on the stake or chipping quite fresh?     A. No, I wouldn't call it fresh.

Q. Would it give you any indication of how long it had been there—do you think it was there a day or two or a month or two?

A. It was weather-beaten some.

Q. Was the stake green or pretty well dried out?

A. It wasn't green then. [110—88]

Q. It was pretty well dried out, or do you remember?     A. I couldn't say how dry it was.

Q. Did you examine the stakes or rather state what stakes you saw at the vicinity of where you afterwards placed your corner on the right limit?

A. There was two stakes.

Q. Describe those?

A. There was one, I think it was a spruce stake, of Richard Bell, claiming Number Three downstream, an arrow pointing downstream.

Q. What was the other stake?

A. There was nothing on the other stake.

Q. What kind of a stake was it?

A. A willow stake.



(Testimony of Dan D. Sutherland.)

Q. How was it marked, if at all?

A. There was no markings.

Q. Was it blazed or hewn?      A. It was, yes.

Q. How?    On how many sides?

A. Well, it was hewed on two sides, I think.

Q. How large was it?

A. It was something like the other stake, a small stake.

Q. It looked very much like the willow stake you saw at the upper corner on the right limit?

A. It was a willow stake about that size.

Q. And appeared to have been there about that long?      A. I couldn't say how long.

Q. Did it appear to be quite fresh or appear to have been there some weeks?

A. No, it didn't appear to be fresh.

Q. Was it somewhat weather-beaten?    [111—89]

A. Yes, it was.

Q. Was it green or somewhat dried out?

A. I couldn't say how long it had been there.

Q. Wasn't it very similar in size and in the way it was hewn and every other appearance to the willow stake you saw at the upper corner on the right limit—weren't the two willow stakes very much alike?

A. Well, I don't know, I couldn't say that, this one was a shorter stake.

Q. How long was it?

A. Probably two feet, possibly a little over.

Q. Did you look to see whether there were any markings on that stake?      A. I did.

Q. Were there any?      A. No.

(Testimony of Dan D. Sutherland.)

Q. Are you positive there was none?

A. Yes, I am.

Q. Did you examine it carefully to see whether there were any markings on it?

A. Well, I looked at it where it was hewed.

Q. You say you did not on August 30th or prior to that time examine the corners on the left limit in the vicinity where you afterwards placed your corner? A. No.

Q. How long after that did you examine those places, how long after August 30th, 1913?

A. The 31st.

Q. The next day? A. Yes.

Q. What stakes did you find in the vicinity of where you placed [112—90] your upper corner on the left limit? A. There was two stakes.

Q. Describe each stake and the markings on it?

A. There was Mr. Shade's by Nelson claiming 1320 feet upstream and another willow stake.

Q. About how large?

A. Probably an inch or an inch and a half.

Q. And how high? A. Couple of feet.

Q. And how was it hewn, if at all?

A. I wouldn't be positive about that; that stake, the bark was either off of it or it was chipped all around, I wouldn't be sure.

Q. Wasn't it chipped on two sides?

A. It might have been—it was chipped on one side I know.

Q. And you think the bark was off of it?

A. Yes.

(Testimony of Dan D. Sutherland.)

Q. And was it a green stake?

A. No, it wasn't a green stake.

Q. Were there any markings on it?      A. No.

Q. Did you examine it carefully to see whether there were any markings on it?      A. Yes, I did.

Q. And couldn't see any?      A. No.

Q. Was it quite clean and fresh as though it had been recently hewn or somewhat weather-beaten?

A. It was somewhat weather-beaten.

Q. As a matter of fact, it was something like the two willow stakes you saw on the right limit you have just described? [113—91]

A. Well, I guess they were something the same.

Q. When did you go and inspect the vicinity of where you placed your lower corner on the left limit?

A. The same day, the 31st of August.

Q. State if you found any stakes there.

A. I did.

Q. What were they?      A. I found two stakes.

Q. Describe each.

A. One for R. Bell claiming 1320 feet downstream, a small willow stake.

Q. What was the size of it?

A. It was a small stake, probably two inches in diameter.

Q. About how high?

A. Three feet probably. I didn't measure those stakes at all.

Q. How was it hewn, if at all?

A. Yes, it was,—I think that stake was hewn on the four sides.

(Testimony of Dan D. Sutherland.)

Q. Did you examine it to see whether there were any markings on it?     A. I did.

Q. Did you observe any markings?     A. No.

Q. Did you look very closely for them?

A. I did.

Q. Was the hewing fresh?     Or was it somewhat weather-beaten?     A. It was weather beaten.

Q. Now, as a matter of fact were not the four stakes that you have described, willow stakes and they were all about the same size?

A. No, I couldn't say they were all about the same size. [114—92]

Q. They all ran from two to three feet high?

A. They were willow stakes—I guess they were probably about two and a half feet high.

Q. And probably an inch and a half to two inches in diameter?     A. Yes.

Q. And were all hewn, some on two sides and one you think was hewn all the way around?

A. Yes, sir.

Q. That hewing did not appear to be fresh—they were all somewhat weather-beaten?     A. Yes.

Q. As a matter of fact didn't they indicate that they had all been placed there about the same time?

A. I couldn't say.

Mr. LEEHEY.—That is all.

Witness excused. [115—93]



**[Testimony of O. A. Tucker, for Plaintiff.]**

O. A. TUCKER, a witness called and sworn in behalf of the Plaintiff, testified as follows:

Direct Examination by Mr. DONOHUE.

Q. What is your name?      A. O. A. Tucker.

Q. Where do you reside?      A. In Cordova.

Q. How long have you resided in Cordova?

A. Well, about five years.

Q. Were you last summer in the Sushana mining district?      A. I was.

Q. Were you on or about the first day of September, 1913, on the creek known as Big Eldorado Creek?      A. I was.

Q. Were you on the land in controversy in this action?      A. Yes, sir.

Q. How come you to go over there on September 1st, 1913?

A. I went over there on the request of Mr. Ford and Mr. Sutherland.

Q. When did Ford and Sutherland speak to you first in reference to this land that is now in controversy?

A. On the 31st of August—the evening of the 31st when I got back to camp.

Q. For what purpose did you go over on the land covered by the Surprise Fraction on the first day of September, 1913?

A. The boys stated to me somewhat the circumstances of the location of the claim they had made over there and wanted me to go over and examine the

(Testimony of O. A. Tucker.)

conditions that existed there and help them perfect their location.

Q. When you arrived over there on the first of September, what did you first do? [116—94]

A. I went down to the creek, the Big Eldorado Creek ahead of these boys.

Q. Ahead of Ford and Sutherland?

A. Yes; Sutherland killed some caribou and they were up there, and I says, "I will go ahead."

Q. What did you do when you arrived on the ground?

A. I went down the creek, on the right limit of the creek.

Q. How far down did you go?

A. I went down hunting for this claim from the monuments as they had described them to me, and I missed the upper monuments going down and came up against the lower monument of the Surprise Fraction.

Q. What did you do after that?

A. After I found the property,—I had some little difficulty in locating it—I then worked back up on the left limit, that is close to the creek.

Q. In going over the claim, going down the right limit, and coming back on the left limit, did you see any signs of any mining or prospecting having been done on that land? A. No, I did not.

Q. Now, did you at any time while there on the first place any stakes or do anything towards completing the location of the claim? A. Yes.

Q. What stakes did you place?

(Testimony of O. A. Tucker.)

A. I put some side-line stakes on the right limit.

Q. Do you recall how many you put in?

Mr. FINNEGAN.—We admit the claim was properly staked.

(It is admitted by the defendant that the claim was properly staked on the ground.)

Q. Later on that day when you came to the upper end of the [117—95] Surprise Fraction, did you meet Sutherland and Ford?

A. Yes, I met Ford first.

Q. What did you do in reference to any monuments—what monuments did you find at the upper end of the Surprise Fraction, in the center?

A. I found three monuments there.

Q. Describe them.

A. One was the Surprise Fraction monument; it had the location notice of the Surprise Fraction in it. The other was the Purdy location notice and the other was the Shade-Nelson location notice. There was three there in close proximity.

Q. Where was the Purdy location notice?

A. The Purdy location notice was on the upper end of the claim.

Q. On the upper end of the Surprise Fraction?

A. On the upper end of the Surprise Fraction, yes—adjacent to the other.

Q. Where was the notice itself—what was the notice, the Purdy notice, written on?

A. It was written on a board.

Q. And where was that board?

(Testimony of O. A. Tucker.)

A. The board was under a rock placed on top of the monument.

Q. Did you make a copy of that notice?

A. Yes; Mr. Ford and I together made a copy of it.

Q. Have you that copy with you?     A. I have.

Q. Do you know that the copy you have in your book is a true and correct copy?     A. I do.

Q. Will you produce that book?

A. Yes, sir (witness does so).     [118—96]

Q. Read that copy as you made it from the notice on th first day of September, 1913.

Mr. LEEHEY.—This is in your own handwriting?

A. I think this is in the handwriting of Mr. Ford; he wrote it with my pencil, and I read the notice to him, and then we read it back and compared it between ourselves; I think it is in his handwriting, although it seems as though his handwriting is somewhat similar to my own; it is in his handwriting. My fingers got cold; I cut my finger the day before, and I read it to him and then took the book and and compared it, he and I together.

Mr. LEEHEY.—No objection.

Q. Read the notice as you have it in your book.

A. Notice of Placer Location. I the undersigned locate and claim twenty acres for placer mining purposes, situate on Eldorado Creek, a tributary of Wilson Creek, Chisana Mining District, Alaska, more particularly described, to wit: Commencing at this initial post and running up stream 1320 feet to center end post and 330 feet on each side of initial post and upper center end post. Discovered and located July



(Testimony of O. A. Tucker.)

3d, 1913. Locator, F. W. Purdy. G. L. Gates, attorney.

Q. Describe to the jury the kind and size of the board on which this notice was written.

A. This was a board I took to be a box, a piece of milk box, something of that kind.

Q. What was the size of the box?

A. About 18 inches long and probably four inches wide, something like that; the board showed some evidence of being weather-beaten.

Mr. DONOHOE.—That's all. [119—97]

Cross-examination by Mr. LEEHEY.

Q. Are you positive that that date was July 3d?

A. I am.

Q. You are positive it wasn't July 6th?

A. I am.

Q. How was it written, in figures?

A. In figures, yes.

Q. Was it just the figure, or were the words "rd" or "th" after it?

A. July 3, 1913; I made this verbatim.

Q. There were letters after the figure 3, were there? A. No.

Q. Was the letter or figure 3 clearly legible, or was it one that might be mistaken for another figure?

A. The figure 3 was legible; that is my recollection of it.

Q. Did that notice appear to be written all in the same handwriting? A. Yes.

Q. Was there any witness signature to it?

(Testimony of O. A. Tucker.)

A. No witness.

Witness excused.

Plaintiff rests.

Mr. LEEHEY.—The defendant moves for a non-suit in this action upon the ground and for the reason that sufficient facts have not been established by the testimony to entitle the plaintiff to recover or to support his alleged cause of action. This motion is made primarily because we contend that the location certificate which is essential to the validity of plaintiff's location is not such a certificate as is entitled by law to record and is not in compliance [120—98] with the laws of Alaska.

Motion overruled; defendant allowed an exception.

#### DEFENSE.

[**Testimony of George L. Gates, for Defendant.**]

GEORGE L. GATES, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. FINNEGAN.

Q. What is your name?      A. George L. Gates.

Q. Where do you reside?

A. I have been residing at Forty Mile for the last six years; my home is in the State of Oregon.

Q. Forty Mile—is that in the Yukon Territory or on the American side?

A. It is in the Yukon Territory.

Q. How long have you resided in Forty Mile?

A. I have resided there about six years.

Q. How long have you been in Alaska and the Yukon Territory?      A. I came to Alaska in 1895.

(Testimony of George L. Gates.)

Q. About nineteen years?

A. Yes, sir; about nineteen years.

Q. What has been your occupation during that time, principally?     A. Mining expressly.

Q. Where were you about the latter part of May, 1913?     A. Forty Mile.

Q. Was it at that time, the latter part of May, that you heard of the Shushana strike?

A. Yes, sir. [121—99]

Q. In what manner did you hear of it?

A. I received a letter from Nelson stating that he had made a discovery, him and his partners, in the Shushana country, and requesting me and McKinney to come and meet him in Dawson at the earliest possible date and accompany him back,—that he wished to take a small boat up the White River and would wait there until we arrived in Dawson to accompany him.

Q. You had known Nelson before?     A. Yes.

Q. How many years?

A. I had known him about ten years previous to this.

Q. Had you had any business relations with him?

A. Yes, I have been partners with him in some mining operations.

Q. And immediately upon receipt of his letter, did you leave Forty Mile?

A. We left within two or three days, the first steamer that came up.

Q. Where did you go to?     A. Dawson.

Q. Did you meet Nelson there?     A. Yes.

(Testimony of George L. Gates.)

Q. When did you leave Dawson?

A. We left Dawson about the first days in June.

Q. Who constituted the party?

A. Nelson and McKinney and myself.

Q. And you proceeded to the Shushana diggings?

A. Yes, sir.

Q. Up the White River?

A. Yes, up the White River. [122—100]

Q. In what manner did you travel, did you go overland?

A. No, we went up the river in a small boat, folding boat.

Q. Did you have an outfit with you?

A. Yes, sir.

Q. When did you reach the Shushana?

A. We reached the Bonanza Creek the evening of the 26th of June.

Q. How far up the White River did you go in the folding boat?

A. We came about 125 or 130 miles as near as I can estimate it.

Q. Then how did you progress?

A. Then we progressed with pack horses from there into the diggings; at that point we met Mr. Taylor and Mr. Doyle with pack horses and came with the pack train on over.

Q. You reached the diggings about June 26th?

A. Yes.

Q. What did you do immediately upon your arrival in the diggings with reference to prospecting?



(Testimony of George L. Gates.)

A. We went around over the different creeks looking at them and panning and prospecting.

Q. During your prospecting tour, did you visit Eldorado Creek?     A. Yes, sir.

Q. Did you upon a certain day in July, 1913, locate a placer mining claim on Big Eldorado Creek—

A. Yes, sir.

Q. Did you upon a certain day in July, 1913, locate a placer mining claim on Big Eldorado Creek for F. W. Purdy as his agent?

Mr. DONOHUE.—We object to the introduction of any testimony tending to show that this witness located a claim for F. W. Purdy on the ground that there is no proper foundation laid for the introduction of such testimony, in this, that it is [123—101] not shown that the witness complied with the requirements of the Act of Congress dated August 1st, 1912, relative to locating placer mining claims for another as attorney in Alaska.

By the COURT.—The objection will be sustained at this time.

Mr. LEEHEY.—Do I understand we must show the record of the power of attorney before the actual location? I think we are entitled to show the location before the power of attorney is recorded.

By the COURT.—I don't think it is very important at this time, it simply goes to the order of proof anyhow and if it is not shown that he is authorized to make the location as attorney in fact for another, then of course the testimony will be stricken out.

Mr. DONOHUE.—The only point I make is that

(Testimony of George L. Gates.)

in case the defendant is unable to establish that he has complied with the Act of August 1st, 1912, all this testimony would have to be stricken out and it would be a useless procedure to go ahead before the foundation is laid.

By the COURT.—I think as far as this question goes he may answer it. The objection will be overruled, and he may answer this question.

Plaintiff allowed an exception to the ruling.

By the COURT.—It is admitted as a preliminary question, with the understanding that if it is not shown that he is authorized to make a location under the law, this testimony will be stricken out.

Q. Did you upon a certain date in July, 1913, locate a placer mining claim upon Big Eldorado Creek for F. W. Purdy as his agent? [124—102]

A. Yes, sir.

Q. What date was that?

A. On the 6th day of July.

Q. What did you do on that date relative to locating that claim; what acts did you perform?

Mr. RITCHIE.—We renew the objection; before they can show what he did by virtue of a power of attorney, he must show he had a sufficient power of attorney.

By the COURT.—I don't feel like controlling counsel in the order of proof. They may for certain reasons have prepared their case, arranged to call witnesses along certain lines, and I don't feel like controlling them and directing that they should prove certain things first. You understand they

(Testimony of George L. Gates.)

have to prove that they had a power of attorney in the proper way and without that, this testimony will be stricken out.

Mr. FINNEGAN.—I will say that we hardly expected to put any witnesses on the stand this afternoon, we didn't know plaintiff's case would be finished so soon.

By the COURT.—The objection will be overruled at this time with the same understanding as to the other question.

Plaintiff allowed an exception to the ruling.

Q. State on July 6th what acts you performed relative to staking a placer mining claim.

(It is understood this and all similar questions go in under the same objection and exception.)

A. I panned on the claim, prospected some there.

Mr. DONOHOE.—What claim have you reference to?

A. I have reference to the claim I staked for Mr. Purdy on Big Eldorado. [125—103]

Mr. DONOHOE.—Number Two Below on Big Eldorado? A. Yes, sir.

Q. Who accompanied you on this day?

A. Mr. Doyle, Mr. Nelson and Mr. McKinney.

Q. Where was your camp situated?

A. Our camp was situated on Little Eldorado, near its junction with Bonanza Creek.

Q. And you proceeded from your camp on Little Eldorado, over Gold Hill towards Big Eldorado?

A. Yes, sir.

Q. Mr. Thomas Doyle, W. E. McKinney and Nel-

(Testimony of George L. Gates.)

son were with you?     A. Yes, sir.

Q. You may continue and and state what acts were performed by you in the location of the claim, Number Two Below on Big Eldorado—did you erect monuments?

A. I erected a monument at the lower end of this claim, stepped the ground off from the lower end of Number One, paced it off from there down 1320 feet and built a stone monument about this high (indicating) and wrote the location notice, put it in this monument and then went from there to the lower corner on the left limit and put a willow stake in, about this high (indicating), about an inch and a half or two inches through and marked that corner Lower left limit Claim Number Two Big Eldorado and then I went from there to the upper left limit corner.

Q. Describe that stake to the jury.

A. It was a willow stake.

Q. A green stake?     A. It was green, yes.

Q. Did you blaze the stake? [126—104]

A. Blazed it on two sides, yes.

Q. In what manner?

A. With my pocket knife.

Q. What markings did you make on the stake?

A. I marked it North lower corner left limit No. 2 Big Eldorado.

Q. Then what did you do?

A. Then I went to the other corner on the same limit, the upper corner on the left limit, stepped from the upper end post and put the corner what



(Testimony of George L. Gates.)

be about 330 feet and marked it.

Q. Of what did the corner consist?

A. A willow stake about this high (indicating), two feet and a half, perhaps three feet high.

Q. Describe the stake.

A. The stake was two and a half feet.

Q. Was that blazed—state whether you put any markings on the stake.

A. I blazed the stake, whittled it off flat on one side and marked it, upper corner post No. 2 left limit Big Eldorado.

Q. What kind of a stake was that?

A. It was a willow stake, a green willow stake, about two feet and a half or three feet tall, driven in the ground,—sharpened at one end and driven in the ground.

Q. Then what did you do?

A. Then I went over on the right limit and put corner posts there.

Q. Which corner?

A. The upper corner post, right limit.

Q. Describe it.

A. I whittled it off the same as the other stake with my pocket [127—105] knife and wrote on it, Upper corner post, right limit, claim No. 2 Big Eldorado.

Q. What kind of a stake was it?

A. It was a green willow stake, two or three feet high, sharpened at one end and driven in the ground.

Q. Then what did you do?

A. Then I went down and put in the lower corner

(Testimony of George L. Gates.)

post, right limit.

Q. Describe it.

A. I marked it the same as I did the other one; I wrote lower corner post, right limit, claim No. 2 Big Eldorado.

Q. I believe you stated that you had panned in the creek.     A. Yes, sir.

Q. What was the result of your panning?

A. A few colors of gold.

Q. In how many places did you pan, if more than one?     A. Two or three—two places.

Q. With reference to the end lines of your location, what portion of the claim did you pan?

A. I panned one pan near the upper end and I think the other one was near the middle of the claim.

Q. Relative to the colors you found in panning—what did that indicate to you?

A. It is indicated that it was valuable for mining purposes.

Q. What else did you do relative to completing the location of the claim?

A. I wrote my location notice and placed it under a rock on the lower end of the claim.

Q. Upon what was that location notice written?

A. It was written on a piece of board about this long (indicating) [128—106] and about four inches wide—about 18 inches long and about four inches wide—a piece of board taken from a small box, perhaps a milk case.

Q. Did you at that time make a copy of the location notice?     A. No, sir.

(Testimony of George L. Gates.)

Q. Who were present or were any persons present when you placed your location notice on the monument?

A. Mr. McKinney was present and Mr. Doyle and Mr. Nelson.

Q. Did they witness your location notice?

A. I don't remember whether they signed it as a witness or not.

Q. Will you kindly describe your location monument?

A. The location monument was a monument built of stone, about two feet and a half high.

Q. Where did you place your location notice?

A. I placed it on the top of this monument, with a flat rock on top of it.

Q. You speak of this monument, what monument do you mean?

A. I mean the initial monument at the lower end of the claim, No. 2 Big Eldorado.

Q. The lower center end?

A. The lower center end, yes.

Q. Previous to staking that claim, did you measure the claim?

A. Yes, I measured it down from No. One, from the lower end of Number One.

Q. How did you measure it?

A. Stepped it, paced it.

Q. What was your estimate of the distance, of the length of the claim?     A. About 1300 feet.

Q. The claim as staked by you, or as measured and staked by [129—107] you—did you purposely

(Testimony of George L. Gates.)

measure that and stake it less than 1320 feet?

A. Yes, I generally do that in staking ground, get a little short so as not to have a fraction.

Q. Did you measure from your center end monument to your corner monuments on both limits?

A. I paced that off also.

Q. The four corners?      A. Yes, sir.

Q. About what did they approximate?

A. About 300 feet each way from the center end post.

Q. Did you do any other acts toward completing the location of that claim—did you perform any other acts at that time?

A. No, I don't remember of doing anything else there.

Q. Were the parties you have mentioned present with you during the measuring and staking of this claim, that is W. E. McKinney, Nels P. Nelsons and Thomas Doyle?

A. They were on the claim there, yes.

Q. Did they see you place the stakes?      A. Yes.

Q. Were they with you when you placed the stakes?

A. They were not right with me—they stopped down near the center end post and I went up on the hill alone and placed these stakes.

Q. What is the topography of the claim? Can you see from one end to the other?      A. Oh, yes.

Q. Can a person in the creek see the corner stakes on both sides?      A. Yes, sir. [130—108]

Q. What date did the notice which you placed on



(Testimony of George L. Gates.)

the lower center end monument bear?

A. July 6th.

Q. Do you remember what the contents of that notice were, what the markings on it were?

A. Well, pretty close to it, I think, yes.

Q. State what they are?

Mr. DONOHOE.—We object on the ground that it is not the best evidence.

By the COURT.—If he has a copy of the original or made a copy of it—

Mr. FINNEGAN.—He testified he made no copy of it.

By the COURT.—You asked him if he made a copy at the time?

Q. Since the 6th day of July, have you made a copy of your original location notice? A. No.

Q. Have you the original location notice in your possession? A. No, I have not.

Q. To the best of your knowledge where is the location notice?

A. To the best of my knowledge the original location notice is on the claim.

Q. Will you now describe as best you can the contents of that location notice.

Mr. DONOHOE.—We object to that question on the ground that it is not the best evidence; unless the witness can testify to the notice complete, he should not be permitted to put his own construction on what the notice contained.

By the COURT.—He may give his best recol-

(Testimony of George L. Gates.)

lection of what it contained. (Plaintiff excepts to ruling.)

A. The location notice claimed 1320 feet I think was claimed [131—109] on the notice, up stream, for mining purposes and 330 feet on each side of the two center end posts and stated that I made this location on the 6th previous to the staking of the ground; that the claim is situated on Big Eldoraro, as Number Two, a tributary of Wilson Creek and that it is staked by power of attorney for Mr. Purdy.

Q. Did you hear the notice as read by Judge Tucker and Mr. Ford here in the court room to-day?

A. No, I didn't hear it.

Q. How was the notice signed?

A. I signed the notice as attorney for Mr. Purdy.

Q. State how you signed the notice?

By the COURT.—Did you write Mr. Purdy's name on it and then yours as attorney?

A. Yes, I wrote Mr. Purdy's name as locator and my name as attorney for Purdy.

Q. And that was dated the 6th?

A. That was dated the 6th, yes.

Q. That was also included in it?      A. Yes, sir.

Q. Was that written in lead pencil?      A. Yes.

Q. What did you do after July 6th, how were you occupied?

A. I was working for Mr. Nelson and Mr. James on Little Eldorado.

Q. Until what time?

A. I was working until about the 20th of July, working on their claim on Little Eldorado.

(Testimony of George L. Gates.)

Q. At the time your arrival in the Shushana, about June 26th, was there a mining recorder in that district?   A. No, sir. [132—110]

Q. Do you know H. E. Morgan?

A. Yes, I know him.

Q. He was later appointed United States Commissioner for that district?   A. Yes.

Q. Do you know what time Morgan arrived in the diggings?   A. No, not the exact date.

Q. What is your best recollection?

A. I think he must have arrived there some time about—between the 20th and 25th of July.

Q. You know a certain one, Frank W. Purdy?

A. Yes, sir.

Q. How long have you known Mr. Purdy?

A. I have known him about twelve years.

Q. Where does Purdy reside?

A. He resides at Forty Mile.

Q. What is his occupation?

A. He is clerk in a store at Forty Mile.

Q. For whom?   A. For the N. C. Company.

Q. That is a mercantile company?

A. Navigation and Commercial Company.

Q. An American corporation?   A. Yes, sir.

Q. Do you know the citizenship of Mr. Purdy?

A. Well, he told me that he was a native of the State of Massachusetts.

Q. What relations have existed between you and Mr. Purdy?   A. In what way?

Q. In a business way—have you ever been partners? [133—111]

(Testimony of George L. Gates.)

A. Yes, we have been partners in some mining deals.

Q. How long has your connection with him existed?

A. I made an arrangement to be in partners with Purdy—I entered into a partnership arrangement with Purdy last spring previous to coming on this trip up here.

Q. What was that arrangement?

Mr. DONOHUE.—We object as incompetent, irrelevant and immaterial and having no bearing on this issue.

Objection sustained—defendant allowed an exception.

Q. State whether, prior to your departure from Forty Miles, Mr. Purdy executed and delivered to you a power of attorney.

Mr. DONOHUE.—We object to that question on the ground that it is not the best evidence—the power of attorney if executed will speak for itself.

Mr. FINNEGAN.—To locate mining claims in Alaska?

By the COURT.—With that addition he may answer.

Plaintiff allowed an exception to the ruling.

A. He did.

Q. Was that power of attorney acknowledged?

Mr. RITCHIE.—We object—we want the power of attorney itself.

Q. Was the power of attorney in writing?

A. Yes, sir.



(Testimony of George L. Gates.)

Q. Was it acknowledged before a notary public?

Mr. RITCHIE.—We object to any description of this power of attorney until there is an explanation of its absence.

By the COURT.—I think you had better, in view of this objection, account for the power of attorney, why you haven't it, etc.

(Last question withdrawn.)

Q. What did you do with the power of attorney?

A. I brought it along with me. [134—112]

Q. Where did you first take it?

A. Where did I receive it from Purdy?

Q. Yes. A. In Forty Mile.

Q. Where did you then take it?

A. I brought it with me up to the Shushana—took it to Dawson with me first.

Q. What did you do with it in Dawson?

A. Took it to the American Consul.

Q. Who is the American Consul?

A. Mr. Cole.

Q. What did you then do with it?

Mr. RITCHIE.—We object to that; if they want to show the acknowledgment and proper execution of this power of attorney they should produce it.

By the COURT.—The question is open to objection—it may call for an answer that is not intended; you should either produce the power of attorney if you desire to use it as evidence or account for its absence.

Q. On your arrival in the Shushana, did you have that power of attorney in your possession?

(Testimony of George L. Gates.)

A. Yes, sir.

Q. Did you have it in your possession on the 6th day of July, 1913?     A. Yes, sir.

Q. What did you do with the power of attorney after the 6th of July?

A. After the 6th I kept it in my possession until about the 20th of July and then I left it with Mr. McKinney; I was going to make a trip for Mr. Nelson and James over near the [135—113] boundary line and I left it with McKinney there.

Q. For what purpose?

A. To be recorded with the recorder when his office was established.

Q. Was there a recording office established there at that time by Morgan?

A. No, not at the time I left.

Q. Was the power of attorney ever returned to you?     A. Yes, sir.

Q. About what time?

A. McKinney returned it to me when I came back.

Q. When was that?

A. I think it was about the 22d or 23d of July; no, it was the 7th of August I returned.

Q. How long after that did you have the power of attorney in your possession?

A. I had it in my possession until I took it with me when I went back to Forty Mile and Dawson.

Q. When was that?

A. That was in November I went to Dawson and about the first part of January I went to Forty Mile and took it among other papers down to Mr. Purdy

(Testimony of George L. Gates.)

in regard to this suit.

Q. Did you leave the power of attorney with Mr. Purdy?

Mr. RITCHIE.—We object to anything further along this line—the plaintiff contends that they have no right to introduce in evidence anything regarding the power of attorney but the record; let them produce the record and show the power of attorney.

By the COURT.—The objection will be overruled; I am waiting for counsel to get around either to introduce the power of attorney or explain why he cannot. [136—114]

Mr. RITCHIE.—We claim we are bound by nothing except the record.

By the COURT.—Suppose it was duly recorded, every word of it and it was a full and valid power of attorney, wouldn't the original be admissible?

Mr. RITCHIE.—I think it would, with the proper endorsement on it.

Plaintiff allowed an exception to the ruling.

A. I don't think I did—I don't think I left it with him.

Q. Where is the power of attorney now?

A. I don't know.

Q. Can you explain to the jury why it is that you cannot produce it now?

A. Well, for the simple fact that I have lost the power of attorney and can't find it in any of my papers.

Q. When did you last see it—when did you first miss it?

(Testimony of George L. Gates.)

A. I missed it first here, after I arrived in Cordova.

Q. When did you last see it to the best of your recollection?

A. Well, I feel positive I seen it here after I came here to Cordova in the hotel.

Q. At the time you last saw the power of attorney was there any endorsement on the back thereof?

Mr. DONOHOE.—We object; the power of attorney speaks for itself and the endorsement thereon.

By the COURT.—Yes, that is part of the contents.

Mr. FINNEGAN.—The witness has shown it is lost—I will ask him—

Q. Have you a copy of that power of attorney?

A. No, sir, I have not.

Q. Have you made any search for the power of attorney?

A. I have been looking for it every day since I have been here. [137—115]

Q. To what extent have you searched for it?

A. I have searched through all my papers, all my clothing, searched my room, made enquiry of the different parties that were with me if they had seen anything of it. I have made enquiries of all the parties that were with me and looked through McKinney's papers and clothing and made every effort possible to find it.

Q. Is there any other act you have performed?

A. I telegraphed to Purdy asking if he had it in his possession—there might be a possibility that I was mistaken about bringing it with me and he an-



(Testimony of George L. Gates.)

swers that he is positive I brought it along.

Q. Do you know what that paper is? (Handing witness telegram.)

A. That is a copy of the telegram I sent to Mr. Purdy.

(It is marked for identification Defts. Exhibit 1.)

Q. State what that paper is? (Handing witness another telegram.)

A. That is the answer I received from Purdy.

Q. In response to your telegram? A. Yes, sir.

(It is marked for identification Defts. Exhibit 2.)

Mr. LEEHEY.—We offer these telegrams in evidence.

Mr. DONOHOE.—We object to the introduction of these two telegrams in evidence on the ground that they are incompetent, irrelevant and immaterial and do not tend to establish any issue raised by the pleadings in this case.

Objection overruled—plaintiff allowed an exception.

They are marked Defts. Exhibit 1 and 2, read to the Jury by Mr. Finnegan; copies are attached hereto and made a part hereof.

Q. You have stated that you have no copy of that power of attorney? [138—116] A. No, sir.

Q. Did you ever read the power of attorney?

A. Yes, sir.

Q. Do you know its contents fully?

A. Yes, I think I do.

Q. State the contents.

Mr. DONOHOE.—We object to that question on

the ground that in order to introduce the power of attorney in this case authorizing this witness to locate mining claims, the power of attorney must be in writing, duly acknowledged and recorded and without being recorded, it cannot be introduced in evidence and the record is the best evidence; on the further ground that the defendant has pleaded in his amended answer that the power of attorney under which Mr. Gates was acting was duly recorded in the records of the White River recording precinct at page 280 of Volume One of said records and as those records are now here present in Cordova and in this court in the custody of the clerk of the court, we demand that they prove the power of attorney by the record as it appears and the record is the best evidence in this case.

Mr. LEEHEY.—I am going to offer in evidence pages 278, 279 and 280 of the records of the White River recording precinct and in accordance with the agreement we have heretofore had with counsel, we have had these copies certified by the clerk.

By the COURT.—These are the pages on which it is claimed this power of attorney was recorded?

Mr. LEEHEY.—Yes, and I offer the preceding pages; beginning on [139—117] page 278, there are powers of attorney and they are numbered 1, 2, 3, 4, 5 down, and I offer all of page 280, which includes Number 11. This particular power of attorney is Number 9.

Mr. DONOHOE.—To which offer plaintiff objects; we object to the introduction of pages 278 and 279

and all that part of 280 excepting the instrument marked Number 9 on the ground that the same is incompetent, irrelevant and immaterial and has no bearing on this case. We object further to the introduction of the instrument marked No. 9 on page 280 on the grounds that it does not show from the record that it is a power of attorney or what nature of instrument it is; it does not show that it acknowledged before any one and is wholly incompetent and inadmissible in this case, because it shows absolutely nothing.

Mr. LEEHEY.—The objection made by counsel is further reason for introducing the whole three pages because the pages start off with the caption Powers of Attorney and are consecutively numbered 1, 2, 3 down; my only reason for introducing Number 11 is to offer the full three pages.

By the COURT.—Now, you have got two matters, two objections, at the same time. I have considered the brief and authorities you have submitted and have allowed testimony to show it was lost. You do not contend against that?

Mr. DONOHOE.—No, we do not contend against the proposition that it is lost but we do contend seriously that the instrument must be recorded to be of any validity in this case; generally they might be permitted to introduce oral evidence of an instrument that has been lost—that is not our position here. Our position is, unless his power of attorney is recorded [140—118] before intervening rights, it is absolutely worthless as conferring any power upon

the attorney in fact to proceed to locate a claim.

WHEREUPON court adjourned until to-morrow (Thursday) April 2, 1914, at 10 o'clock A. M.

**Proceedings Had Relative to Admission of  
Testimony as to Power of Attorney.**

Thursday, April 2, 1914—Morning Session.

Mr. RITCHIE.—In this power of attorney matter, before Your Honor renders your decision, I desire to file the following formal objection to the admission of oral testimony as to the original of alleged power of attorney from Purdy to Gates:

Plaintiff objects to the introduction of parol testimony concerning the alleged original power of attorney from defendant to G. L. Gates authorizing Gates to locate claims in Alaska for defendant, on the following grounds:

1.

That the original document is the best evidence and no sufficient showing of its loss or of diligence to produce it has been made.

2.

It is admitted by defendant that said claimed power of attorney was not filed for record in any precinct of the Third judicial division of Alaska prior to the attempted location of the ground in controversy herein as claimed by defendant.

3.

The only power of attorney pleaded by defendant is the one recorded in volume 1, page 280 of the records of White River precinct; no impeachment of the records of White River precinct is pleaded by defend-



ant; therefore no testimony is admissible to impeach said records or to show the existence [141—119] of another and different power of attorney.

## 4.

The testimony of witnesses as to said power of attorney is admitted to be offered after they have recently examined an alleged copy, not authenticated or proven in any way to be a copy, and their testimony is therefore not from their individual recollection.

**[Opinion Relative to Introduction in Evidence of  
Power of Attorney.]**

By the COURT.—Section 129b., Compiled Laws of Alaska, enacted August 1st, 1912, provides:

“That no person all hereafter locate any placer mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney, in writing, duly acknowledged and recorded in any recorder’s office in the judicial division where the location is made.”

I had occasion to construe this section in the recent case of Likaits vs. Johnson, and there held that the act of recording the power of attorney was one of the acts of location, and that it is immaterial in what order the several acts of location are performed, provided they are performed before the rights of another intervene.

In this case defendant Purdy claims to have given his power of attorney in writing, duly acknowledged, to one Gates on May 31st, 1913. Gates claims that he made a location on a placer claim for Purdy, under said power of attorney, on July 6th, 1913, and that he

made discovery, marked the boundaries of the claim, and on July 27th, 1913, filed his location certificate with the recorder at Shushana (or White River Precinct) and on July 29th filed said power of attorney with said recorder. On the trial of this case the witness Gates claims that he has lost said original power of attorney and testifies that he has made diligent search therefor, giving details of where and when and how he made search, and cannot find it. [142—120]

Had the power of attorney been properly recorded by the recorder in said precinct, said record would have been offered and received as proof thereof. However said recorder, having just assumed his office, and being unfamiliar with the duties thereof, and being in a remote and inaccessible region in the far interior of Alaska, evidently proceeded on the theory that a mere abstract of the documents filed for record with him, was sufficient. Accordingly in this case he made the following entry in Book 1, at page 280:

“July 29, 1913.

Frank W. Purdy to G. L. Gates.

Sworn to before R. McDonald of Forty Mile.

JAS. McLEOD.

May 31st, 1913.

Recorded at 55 M. past 6 A. M., July 29, 1913, by request W. E. McKinney.

(Sgn.) H. E. MORGAN,

H. H. Waller, Dep.”

Defendant offers in evidence this record, together with the page immediately preceding and the page immediately following for the purpose of illustrating the method of said recorder in making said records or

abstracts thereof, and also offers to prove by the oral evidence of the witness Gates, the contents of said power of attorney claimed to have been lost. (Defendant also claims to be able to prove the same facts by witness McKinney, who received the power of attorney from Gates, and gave it to the recorder to be recorded.)

Under the system in force in Alaska, whereby U. S. Commissioners and ex-officio recorders receive fees only, in remote places it is exceedingly difficult to get competent and well qualified officers to fill such positions, where the fees may not afford even a living, and the methods of recording are often crude, as appears was the case here. [143—121]

While there is a conflict in the authorities, there is abundant authority to support the proposition that when one has filed an instrument for record with the proper officer, his duty ceases. See *Shepard vs. Murphy*, 58 Pac. 589.

“In the absence of any statute requiring it, a power of attorney need not be acknowledged, or recorded although as matter of proof of authority the power may be and usually is recorded with any recorded instrument which has been executed under it. \* \* \* As the purpose of requiring acknowledgment and record is thereby to give notice to third persons, failure to record the power of attorney even when recording is required by law, will not invalidate the agent's acts thereunder except as to creditors and subsequent purchasers without notice, unless the statute makes record-

ing a prerequisite to authority to act, or provides that unrecorded instruments shall be absolutely void." 31 Cyc. 1231.

Counsel for plaintiff suggests that as plaintiff does not take the interest claimed by him by descent, he in law is a purchaser, but can it be said that he is a purchaser "without notice"? Surely not, for the staking on the ground, the notice of defendant posted on the ground, every fact and circumstance in this case points conclusively to the fact that the plaintiff had actual notice that the **ground he attempted to locate** was already located and claimed by another, who signed the location as **attorney in fact for his principal**.

The purpose of this Act of August 1st, 1912, I am satisfied was primarily to limit the number of locations that could be made to two, each calendar month. It was not intended in my opinion that the recording of the power of attorney was intended primarily to give notice to one seeking to make a location of unappropriated and unclaimed public mineral land.

That notice, in most cases, and particularly in this case, was given to the subsequent locator, the plaintiff [144—122] here, by the actual stakings or markings on the ground. The plaintiff testifies that he did not even look at the records; did not make any attempt to find if any location certificate or power of attorney had been filed or recorded by defendant, but that he did find the ground staked and defendant's location notice on the ground, but, as plaintiff claims, giving a misdescription of the claim. Had he have done so, he would have found at least



this abstract of the power of attorney, which would have advised him that such an instrument had been filed by defendant.

Had the author of this Act of August 1st, 1912, intended that the recording of the power of attorney was for the sole or primary purpose of giving notice to a subsequent locator, he, Hon. James Wickersham, long one of the district judges in Alaska, and thoroughly familiar with the needs and peculiar conditions prevailing in this territory, would not have been satisfied with the provision that such power of attorney might be recorded anywhere in the judicial division wherein the location was made.

In this, the Third Judicial Division, such recording might literally have been done at a point over one thousand miles distant from the place where a placer location could be made thereunder, and of what avail, as a matter of notice, would such recording be?

I feel satisfied that the record made by the recorder, Morgan, of this power of attorney, defective though it be, ought to be admitted in evidence. That the defendant in good faith filed it for record and paid the recording fee, and had a right to rely upon the recorder performing his duty in recording it properly. To hold otherwise would be virtually to hold the location of defendant void, regardless [145—123] of the fact that he may have made a valuable discovery, properly marked his boundaries on the ground, and otherwise complied with the law.

I am also satisfied that the defendant has met the requirements of the law in his showing of diligence

in searching for the lost power of attorney, and should be permitted to give oral evidence of its contents. I am strengthened in this opinion by reason of the fact that the defendant made an application for a continuance in this case for the purpose of making further search for this lost document; and upon the Court suggesting to counsel for plaintiff that terms might be imposed to indemnify plaintiff and his witnesses for loss of time and expense of delay in such continuance was granted, they did not meet such suggestion further than to set out in an affidavit that plaintiff would be damaged by such delay in more than Three Thousand Dollars.

To reject the evidence thus offered by defendant would practically work a forfeiture of his mining claim, if it be sufficient in other respects, and so resting upon that highly useful and salutary principle that forfeitures are odious in the law, the courts will not resolve a doubt, either by law or fact, in favor of a forfeiture of property rights.

I am compelled to overrule the objection to the introduction of the evidence so offered by defendant.

To which ruling of the Court counsel for plaintiff is allowed an exception.

Mr. DONOHOE.—In the matter of the offer of this exhibit, being a transcript of certain pages of the records of the White River precinct we object on the ground that it is irrelevant and immaterial testimony and that it contains many matters having no relation to this case; that it is on unfair [146—124] transcription from the records, of Volume One of the records of the White River recording

precinct, in this—it sets forth, commencing on page 278 and ending on page 280, what purports to be a transcript of the record. An examination of the record shows that from page 220 to page 270, being pages preceding the pages of the record from which this exhibit is taken, that powers of attorney are recorded on each and every one of those pages, duly spread in full upon the minutes in this book, duly acknowledged and the acknowledgement spread thereon, and bearing an imprint of the notarial seal and we submit if we are going to introduce anything else by way of showing how the records were kept, that pages from 220 to 270 inclusive be added to the exhibit. \* \* \* If the whole book goes in I have no objection to it, as illustrating the method or recording. That, added to the objections made last night to the introduction of this exhibit I think covers our position.

Mr. FINNEGAN.—We would be glad to have the whole book admitted.

By the COURT.—You can save a great deal of unnecessary expense and labor if you will agree on such portions as illustrate the method used; sometimes the recorder extended the documents at length, other times he made an abstract. \* \* \* If counsel thinks it important to show that some documents were recorded at length, you will be permitted to do so.

Mr. RITCHIE.—It may be that we can agree on what is essential in order to show the method of keeping this book from the inception.

By the COURT.—If you cannot agree on such

pages as will illustrate this matter fairly, you may put the whole book in. If you want to agree on certain pages of it and offer it in [147—125] evidence, you may do so. The objection to the present offer will be overruled and exception allowed plaintiff.

Mr. DONOHOE.—I want to state my objection to that transcript again—the plaintiff at this time objects to the introduction of Defendant's Exhibit 3 on the ground that it is immaterial and incompetent and does not tend to prove any of the issues in this case; and on the further ground that it is an unfair representation of the method in which powers of attorney were recorded in the White River recording precinct as shown by Volume One of said records.

By the COURT.—The objection will be overruled with the understanding that plaintiff if he desires may offer such other portions or all the balance of said recording book.

Mr. LEEHEY.—To which defendant has no objection.

(Ex. 3 admitted.)

Plaintiff allowed an exception to the ruling.

Mr. RITCHIE.—I want to ask the witness a few questions regarding this power of attorney. (Permission granted.)

Cross-examination by Mr. RITCHIE.

Q. I don't remember when you said you last saw that power of attorney.

A. I am not positive I seen it here in Cordova, but I am under the impression I seen it among my papers



(Testimony of George L. Gates.)

after arriving here; I can swear positively I seen it at Forty Mile.

Q. You saw that power of attorney, I understood from your testimony, after it was recorded by McKinney?     A. Yes, sir.

Q. It was returned to you?     A. Yes, sir.

Q. About when you returned into the district about the 7th of August, or soon after?

A. Yes, sir. [148—126]

Q. You put it among your papers at that time?

A. Yes, sir.

Q. Did you see it again before you left the Shushana district?     A. Yes, I think I did.

Q. Where did you go from the Shushana last fall?

A. I went cross country to the White River and down the White to Dawson.

Q. And where did you spend the early part of the winter?     A. In Dawson.

Q. Did you see the power of attorney while you were there in Dawson?     A. Yes, sir.

Q. About what time did you see it last?

A. I seen it about the first of January, perhaps the 5th of January.

Q. Was it among your papers?     A. Yes, sir.

Q. With other papers referring to the Shushana district?     A. Yes, sir.

Q. Did you keep them all together?

A. Yes, I had them all together when I left Dawson going to Forty Mile.

Q. When was that?

(Testimony of George L. Gates.)

A. That was about the 5th of January.

Q. And when did you go to Forty Mile?

A. About the 7th of January.

Q. How long did you remain at Forty Mile?

A. I remained there about six or seven days.

Q. And where did you go then?

A. I came to Dawson. [149—127]

Q. You went back to Dawson? A. Yes, I did.

Q. Did you see the power of attorney while you were at Forty Mile?

A. Yes, I turned all the papers pertaining to this ground over to Purdy, with some other documents from Mr. Leehey.

Q. And this power of attorney was among them?

A. Yes, sir.

Q. You are sure of that? A. Yes.

Q. When did you leave that country up there to come to Cordova on this trip—when did you leave Forty Mile and Dawson to start for Cordova for this trial? A. I left in February.

Q. Which place did you leave?

A. I left Dawson.

Q. How long before that had you been in Forty Mile? A. I was in Forty Mile in January.

Q. Did you get those papers from Purdy before you started from Forty Mile?

A. He turned over a lot of papers to me, yes, sir.

Q. Did you examine them at that time?

A. I never examined them very carefully, no.

Q. Did you make a list of them?

A. No, no list.

(Testimony of George L. Gates.)

Q. Were those papers that you wanted to bring here for this trial?     A. Yes, sir.

Q. What else was among them besides the power of attorney?

A. Well, there was the records of the location notices. [150—128]

Q. Any other documents or letters?

A. Yes, there was a few other documents; in fact, all the papers pertaining to my other claims.

Q. How did you carry them?

A. I carried them in a bundle with a rubber band around them.

Q. Now, when you put them together and put the rubber band around them, did you notice whether or not the power of attorney was among them?

A. I don't think I examined them carefully, no.

Q. You are certain of that?     A. Yes, sir.

Q. You knew you wanted to use it in evidence here, didn't you?     A. No, I can't say I did.

Q. You didn't know it would be necessary?

A. No.

Q. Did you open that bundle at any time between Forty Mile and Dawson or before reaching Cordova?

A. Yes, at Donjak City on Forty Mile.

Q. What for?

A. To get out some papers for a man that was going to Dawson.

Q. Now, when did you last read that power of attorney?     A. The last time I read it over?

Q. Yes.

A. I glanced over it when I was at Forty Mile.

(Testimony of George L. Gates.)

Q. When you showed it to Mr. Purdy you read it over?   A. Yes, sir.

Q. You never made a copy of that?

A. No, sir.

Q. Do you know of any copy that is in existence?

A. No, sir. [151—129]

Q. Do you know whether anybody ever made a copy?   A. No.

Q. Now, Mr. Leehey has offered here what purports to be a copy of it—who made that, do you know?   A. That copy?

Q. Yes. Do you know who made that copy?

A. I see Mr. Purdy's name to it; I suppose he made it.

Q. Do you know when and where it was made?

A. No, sir.

Q. Do you know at whose request it was made?

A. I suppose it was Mr. Leehey's request.

Q. It was not made at your request?

A. No, sir.

Q. You have gone over that copy somewhat since you came here—you have read it several times.

A. I read it once.

Q. Talked it over with Mr. Leehey and Mr. Finnegan?   A. Yes, sir.

Q. And discussed it, to decide in your opinion whether it is the same document—a copy of the original power of attorney?   A. Yes, sir.

Q. And as the result of these discussions you have satisfied yourself it is?   A. Yes, sir.

Q. Is there anything peculiar about it which re-



(Testimony of George L. Gates.)

minds you of anything in the original, that is, in the wording of it or the signatures to it?

A. No, I don't think that there is.

Q. If you testify to the contents of this power of attorney are you going to testify to the contents of the original or the contents of this copy? [152—

130] A. How is that?

Q. If you testify here to the contents of that power of attorney, are you going to testify to the contents of the original or the contents of this copy?

A. I will testify to the contents of the original as to the best of my knowledge.

Q. The copy is a great deal fresher in your memory than the original? A. Yes, sir.

Q. What makes you so confident it is a copy, an accurate copy—what causes you such confidence that this is an accurate copy?

A. It seems to be very similar to the original

Q. What kind of paper was the original written on? A. Ordinary writing paper I suppose.

Q. Was it in handwriting, with a pen, or typewritten? A. Tyewritten.

Q. All but the signature? A. Yes, sir.

Q. Are there any other valuable papers missing since you left Forty Mile? A. Yes, sir.

Q. What are they? A. Some bills of sale.

Q. Have you any idea how you lost them?

A. I think that they were in the same package with this power of attorney and some other papers.

Q. Have you been reading other powers of attorney, similar to that, since you came here?

(Testimony of George L. Gates.)

A. No, sir. [153—131]

Q. Mr. Doyle has a power of attorney, has he not, Mr. Markley?     A. Yes, sir.

Q. Have you read that?     A. No, sir.

Q. You never saw it?     A. No.

Q. You don't know whether it is similar to the other one or not?     A. No.

Mr. RITCHIE.—We renew our objection—not showing sufficient diligence and the absence of the original has not been properly accounted for and the proper foundation has not been laid for the admission of secondary evidence as to its contents.

Objection overruled; plaintiff allowed an exception.

Direct Examination (Continued) by Mr.

FINNEGAN.

Q. Mr. Gates, can you state the contents of the power of attorney executed by Mr. Purdy on or about the last day of May, 1913, and running to you?

A. Yes, sir.

Q. State it.

Mr. DONOHOE.—We object further on the ground that there is no evidence before the Court at this time to show that the alleged power of attorney was placed upon the record as required by law, previous to the initiation of title by the defendant in this case.

Objection overruled—plaintiff excepts.

Q. State the contents of that power of attorney.

A. It was a power of attorney authorizing me to

(Testimony of George L. Gates.)

stake mining ground in the Territory of Alaska.

[154—132]

Q. Was it acknowledged?

Mr. DONOHOE.—We object to that on the ground that it is leading.

By the COURT.—State everything this power of attorney contained.

Q. Describe it as well as you can, in full.

A. Well, it was a power of attorney authorizing me to take mining ground in the District of Alaska and was acknowledged before a notary at Forty Mile by the name of McLeod and witnessed by Mr. McKinney and Mr. McDonald and had a certificate attached from the Consul at Dawson, with his seal attached, stamped on it, two dollar stamp.

Q. What was the purpose of the consular seal, if you know?

A. I think it was stated that McDonald was duly authorized—I think it was set forth that McDonald was duly authorized to administer oaths and execute documents.

Q. Don't you mean McLeod?

A. Mr. McLeod, I mean, yes.

Q. Where is McLeod now, if you know?

A. He is in Forty Mile.

Q. What official position does he hold, if you know?

Mr. DONOHOE.—We object to that as not the best evidence.

By the COURT.—You mean Forty Mile, Yukon Territory, not in Alaska?

(Testimony of George L. Gates.)

A. Yes, Yukon Territory.

Objection overruled—plaintiff allowed an exception.

A. McLeod is collector of customs at the port of Forty Mile.

Q. Does he hold any other official position?

A. Not that I know of.

Q. Is Mr. McLeod a notary public?

Mr. DONOHOE.—We object as leading.

Objection overruled—plaintiff allowed an exception. [155—133]

A. That is my understanding, yes.

Mr. DONOHOE.—We move to strike the answer as not responsive to the question.

Motion denied—plaintiff excepts.

Q. Who is Mr. McDonald?

A. Mr. McDonald is manager for the N. C. Company at Forty Mile, the mercantile company.

Q. Who is Mr. McKinney?

A. McKinney is a resident of Forty Mile.

Q. What is his occupation? A. Mining.

Q. Is this the same McKinney who is here present in court? A. Yes, sir.

Q. At the time you last remember seeing this document, can you state whether it then contained any endorsement on its back? A. Yes, sir.

Mr. DONOHOE.—We object to that question as he has testified to everything that was in the power of attorney.

Mr. FINNEGAN.—I asked him as to the contents of the power of attorney at the time it was executed



(Testimony of George L. Gates.)

and now I am asking about it at a later date—the last time he saw it.

Q. State what that condition was.

A. Written on the back of it was a statement that it had been filed for record at a certain date.

Q. Where and when?

A. I think it stated it had been filed for record about the 29th of July, or 30th.

Q. Where?

A. In the White River mining district.

Q. By whom? [156—134]

A. By Mr. McKinney.

Q. What else did it contain?

Objected to as leading—objection overruled—plaintiff excepts.

A. It was signed by Mr. Waller, acting recorder.

Q. You mean Mr. Morgan?

A. Morgan was recorder and I think it was signed by Mr. Waller, too, I am not positive.

Q. Did Mr. Waller's endorsement carry with it anything additional, other than his mere name?

A. I don't remember any.

Q. You don't know then whether Mr. Waller signed it as deputy recorder?

Mr. DONOHUE.—We object to that.

By the COURT.—I think the witness is fair; he doesn't quite understand the technical meaning of these matters; he may answer. Plaintiff allowed an exception.

A. I think so, yes.

Q. Do you have any business connections with Mr.

(Testimony of George L. Gates.)

Purdy at this time?      A. Yes, sir.

Q. Have you had previously?      A. Yes, sir.

Q. What are those connections?

By the COURT.—I think you covered that yesterday.

Q. What I refer to is the present connection you have with Mr. Purdy, if any.      A. Yes, I have.

Q. What connection is that?

A. Well, we are interested in these grounds together. [157—135]

Q. In what ground?

A. In the ground I located.

Q. In this ground in question?

A. In this ground in question, yes.

Q. Mr. Purdy is a partner of yours in that ground?      A. Yes, sir.

Q. You are interested, then, in this suit with Mr. Purdy as a part owner?

A. Part owner, yes, sir.

Mr. FINNEGAN.—That will be all.

Cross-examination by Mr. DONOHOE.

Q. You were part owner in this land when you left Dawson or Forty Mile to come here to this term of court?      A. Yes, sir.

Q. And you don't know whether you had that power of attorney with you when you left or not, do you?

A. No, I couldn't swear positively I had.

Q. Did you make an affidavit for a continuance in which you stated that that power of attorney may have been left in some of your old clothes?

(Testimony of George L. Gates.)

A. How is that?

Q. Didn't you state in your affidavit for a continuance here that you didn't know where that power of attorney was, that it might be in a safe at Forty Mile, it might be in Purdy's possession or it might be in some of your old clothes?

Mr. LEEHEY.—We object to that as unfair—the affidavit is here and he may be referred to anything in the affidavit.

Objection sustained—plaintiff excepts.

Q. When you left to come here you were not particular whether [158—136] you had that power of attorney with you or not?

A. I didn't think it was absolutely necessary to bring it.

Q. You are somewhat familiar with the law known as the Wickersham Act, are you not? A. Yes, sir.

Q. And you knew that you had to be authorized by a power of attorney in order to be qualified to locate a placer claim for another? A. Yes, sir.

Q. And still you did not think it was necessary to bring that with you for this trial?

A. I didn't think it was absolutely necessary, no.

A. And you came here to this trial, to establish that you were the attorney in fact for Mr. Purdy and didn't think it was necessary to have the written evidence of it—is that right?

A. I supposed there was a copy of this on the records here, the power of attorney.

Q. You never presented that power of attorney for record, did you?

(Testimony of George L. Gates.)

A. No, I requested Mr. McKinney to present it.

Q. You never did—you didn't know whether it was ever presented of your own knowledge or not?

A. I see an endorsement on the back of it stating it had been presented.

Q. Do you know that whoever endorsed that on the back had any right to endorse it?

A. I suppose they had—I suppose he was a recorder.

Q. That is all you knew about it—you never inquired to know whether Waller was a deputy recorder or not, did you?

A. Yes, I heard he was.

[159—137]

Q. Whom did you ask whether Waller was a deputy recorder or not?

A. I see him working in the office and understood he was deputy recorder.

Q. And that is all you knew about whether he was recorder or not?

A. Yes, sir.

Q. And did Doyle accompany you down from the Canadian country on this trip?

A. Yes.

Q. Doyle told you he had his power of attorney with him, didn't he?

A. No, sir.

Q. Now, when you left Forty Mile, without any knowledge of whether you had that power of attorney with you or not, what made you search when you arrived at Cordova?

A. Mr. Leehey told me that it was necessary I should have it and he asked for it.

Q. You have testified to an endorsement on the back of that power of attorney—you have seen this



(Testimony of George L. Gates.)

instrument which I hand you, haven't you, since you arrived in Cordova? (Handing witness paper.)

A. Yes, sir.

Q. That instrument was given to you by Mr. Leehey for the purpose of refreshing your memory, was it not? A. Yes, sir.

Q. This endorsement on the bottom of that endorsement is in Mr. Leehey's handwriting, is it not?

A. I couldn't say—I never read that before.

Q. Never read that endorsement before? [160—138] A. I never read that.

Q. You never read that endorsement?

A. I never read it on this document—I simply read that (indicating).

Q. Why didn't you read the writing? You have testified about an exact copy of that endorsement, haven't you?

A. I testified to the endorsement on the back of the power of attorney.

Q. And what you have testified to is practically word for word with that endorsement, is it not?

A. Similar to that, yes, as I remember.

Q. And after reading this document, your mind became refreshed as to the contents of the power of attorney, did it not?

A. Well, you might say that it did, yes.

Q. It is almost ten months since you read that original power of attorney—you read the power of attorney when it was delivered to you about ten months ago, did you not? A. Yes, sir.

Q. Where were you when you read that—where

(Testimony of George L. Gates.)

were you when you first read the power of attorney?

A. When I first read the power of attorney was when it was given to me at Forty Mile in May.

Q. What date in May?

A. I think it was about the 31st.

Q. You set up in the affidavit it was the 30th?

A. 30th or 31st.

Q. Which day was it, the 30th or 31st?

A. I will not be positive which day it was, it was one or the other.

Q. You read it then, and what occasion did you ever have to read it again? [161—139]

A. I had occasion to read it again when I took it to the consul at Dawson—read it over with him and asked his opinion as to the validity of it.

Q. Are you an American citizen? A. Yes, sir.

Q. Have you a certificate from the American Consul?

A. It had a certificate attached to it from the American Consul.

Q. And you don't know whether that power of attorney was recorded or not, of your own knowledge?

A. The only knowledge I have that it was recorded was the indorsement on the back of it.

Q. Did you ever examine that particular record that is pleaded in the answer of the defendant to be the record of this power of attorney?

A. No, I never examined it.

Q. Never looked at it? A. No, sir.

Q. Did anybody tell you of its contents?

A. No, sir.

(Testimony of George L. Gates.)

Q. You don't know anything about it?

A. No, sir.

Q. Mr. Leehey didn't give you a copy of its contents the last two or three days when discussing this matter?

A. I don't remember his showing it to me at all.

Q. Did he tell you what it was—did he tell you it was a defective record?

A. No, sir, I don't remember his doing so.

Q. He never told you that?

A. No. [162—140]

Q. You discussed the contents of this power of attorney with Mr. Doyle and Mr. McKinney since you have been in town, have you not?

A. I don't know as I have.

Q. You have discussed the contents of that power of attorney with Mr. Doyle and Mr. McKinney, haven't you, since you have been in Cordova?

A. I believe we have talked about it, yes.

Q. And you have discussed it quite thoroughly, have you not?      A. I don't know as we have.

Q. And Doyle and McKinney have from time to time made suggestions to you as to what the contents of that power of attorney were, have they not?

A. No, sir.

Q. Are you sure they have not?

A. Yes, I am sure of that.

Q. Where do you reside, your home?

A. My permanent home is in the State of Oregon.

Q. How long have you resided at Forty Mile?

A. I have been residing in the Forty Mile continu-

(Testimony of George L. Gates.)

ously for the last six years.

Q. You are engaged in business in Forty Mile?

A. Not in Forty Mile City—I have been mining in what we call the Forty Mile country, sometimes one place and sometimes another, prospecting a good deal of the time, different creeks.

Q. When did you arrive in the Shushana region?

A. We arrived there on the evening of the 26th of June.

Q. You were not one of the original discoverers in that country? [163—141] A. No.

Q. And I believe you testified yesterday how you happened to go into that country? Nelson returned there and told you of the strike, when you were in Dawson or Forty Mile—is that correct?

A. Nelson wrote me a letter from Dawson, addressed to Forty Mile.

Q. And then you joined Nelson at Forty Mile?

A. I joined him in Dawson.

Q. And you and Nelson and McKinney traveled back to the country? A. Yes, sir.

Q. Nelson wrote you of the strike?

A. He wrote to me that he found what he considered fair pay there.

Q. On James' claims?

A. He didn't state on James' claim—he didn't state anybody's claim.

Q. You arrived there about the 26th of June?

A. Yes, sir.

Q. Where were you when you made your first location?



(Testimony of George L. Gates.)

A. I made my first location on Bonanza Creek.

Q. What number?     A. Number 12.

Q. When?     A. That was the 29th of June.

Q. Made that in your own name?     A. Yes, sir.

Q. Where were you on the evening of the second of July?     Where were you on the second of July, in the afternoon and evening?

A. In the evening I was at the mouth of Bonanza Creek or Eldorado Creek, at the camp. [164—142]

Q. That is where the James' camp was?

A. Yes.

Q. Where did you go on the morning of the 3d?

A. The morning of the third of July?

Q. Yes.     A. I don't remember.

Q. You are positive you were not on Big Eldorado on the third?     A. Yes, sir.

Q. You are positive you did not locate this claim, Two Below Discovery, on the third?

A. Yes, sir.

Q. And you are as positive of that as of anything you have testified to, that you did not locate Number Two Below Discovery on Big Eldorado on the third day of July?

A. Yes, sir, I am positive I did not locate it that day.

Q. You are positive you were not there on the third day of July—where were you?

A. I think I was around the camp, over there on Eldorado and Bonanza Creeks.

Q. You located this claim on the 6th day of July, did you?     A. Yes, sir.

(Testimony of George L. Gates.)

Q. You are positive of that, are you?

A. Yes, sir.

Q. Who accompanied you over there that day?

A. Mr. McKinney, Mr. Nelson and Mr. Doyle.

Q. Had any of these gentlemen located any claims over there previous to that time?

A. Not to my knowledge.

Q. What was the first claim located by the party?

A. The first claim located was located by Nelson, I think. [165—143]

Q. What claim?

A. I think it was Discovery claim.

Q. On which end of the claim did he place his location notice?

A. I think the location notice was on the upper end.

Q. Who located the next claim, One Below?

A. Mr. McKinney located that.

Q. Where did he put his location notice?

A. I am not positive I think, though, he put it on the upper end.

Q. Did Nelson stake his claim when he located it?

A. Yes, sir.

Q. Put out the corner stakes? A. Yes.

Q. And McKinney did the same? A. Yes, sir.

Q. And then you located Number Two Below, did you? A. Yes.

Q. Which is the ground in controversy—is that right? A. I located Number Two, yes.

Q. After McKinney had located Number One—is that right?

(Testimony of George L. Gates.)

A. He hadn't completed his location when I staked mine.

Q. Where was he when you started to locate Number Two?

A. He was at the lower center and stake.

Q. McKinney was?     A. Yes, sir.

Q. What was he doing?

A. He was building a monument and preparing stakes.

Q. He had put up his notice before he came down—he had already put up his notice on the upper end?

A. I am not positive but I think so, yes. [166—144]

Q. And he was preparing his corner posts?

A. No.

Q. When you started to locate Number Two he was preparing to locate his monument and preparing his corner stakes?

A. No, he was building a monument at the center end posts.

Q. You said something about preparing corner stakes—what was he doing about that?

A. He was cutting some willows.

Q. He had put in the two corner stakes above at the upper end, had he?

A. I don't know that he had.

Q. You don't know?

A. No, I don't think so.

Q. Where did you go from there?

A. I stepped down from his monument that he was putting up there; he said that was the end of the

(Testimony of George L. Gates.)

claim and I paced down-stream to get the proper length for Number Two.

Q. What did you do at the upper end before you went down to the lower end—what did you do on the upper end of Number Two first—what did you do at the upper end of Number Two when you first came upon that piece of ground?

A. I think we were helping Nelson about a monument there.

Q. You were helping Nelson put up a monument there? A. I think so, yes.

Q. And then you went down to the lower end?

A. I went down to the lower end.

Q. What did you do at that lower end?

A. I stepped down and built a monument.

Q. On which side of the creek did you put that monument?

A. I am not positive about which side of the creek but I think it was on the left limit of the creek.  
[167—145]

Q. The lower end monument? A. Yes, sir.

Q. Where was your upper end monument?

A. The upper end monument was built in connection with McKinney's, a common monument.

Q. And then you put up your stakes, did you?

A. Yes, sir.

Q. What stakes did you put up first?

A. I put up the lower center end stakes.

Q. What kind of a stake did you put there?

A. It wasn't a stake, it was a monument of stone.

Q. How many stones?



(Testimony of George L. Gates.)

A. Well, there was quite a few; it was a monument about two feet at the base and about perhaps two feet and a half high.

Q. What corner stakes did you put out first?

A. The corner stake I put out first was the lower corner stake on the left limit.

Q. What next—which one did you put out?

A. I put out the upper corner stake on the right limit.

Q. Now, Number Three had not been located up to this time, had it?     A. No.

Q. And you first put out the lower corner stake on the left limit and then the lower corner stake on the right limit—is that right?     A. No.

Q. The first stake you put out was the lower corner stake on the left limit.     A. Yes, sir.

Q. What next did you put out?

A. I put out next the upper corner stake on the left limit. [168—146]

Q. And then what stake?

A. Then I came and put the center end stake on the upper end.

Q. What did you do to put the center end stake on the upper end?

A. I whittled off a piece of willow stake, about three feet long and marked it, Upper center end stake Claim Number 2 Big Eldorado.

Q. And where did you put it?

A. I set it on this monument of stone.

Q. Now, when you were at your upper stake on the left limit—what number was that, what corner

(Testimony of George L. Gates.)

did you call that?

A. I called that the upper corner stake, left limit, Claim No. 2.

Q. That was the marking you put on it?

A. Yes, sir.

Q. Is that all the markings that was on that stake?

A. No, I marked on the stake, Upper corner stake, left limit, Claim No. 2 Big Eldorado.

Q. That is all that was marked on the stake?

A. That is all I marked on it, yes.

Q. Where did you go next, after you put up the center end stake?

A. I went over to the upper stake on the left limit.

Q. What did you mark on that?

A. I marked that the same as the other stakes.

Q. Was that all the markings on that stake?

A. That was all I put on, yes.

Q. When did you write your notice of location?

A. I wrote it there.

Q. Is it not a fact that those notices of location were written the night before over on Bonanza Creek and taken over there already written?  
[169—147]

A. I think some of them were and some were not.

Q. Who wrote those notices?

A. I don't remember just who did write them.

Q. They were most all in your handwriting, or were they all in your handwriting?

A. No, most of the location notices were written by Mr. James or Mr. Taylor, I think.

Q. And they were written in advance and taken

(Testimony of George L. Gates.)

over by your party to be put up?

A. Some of them were, yes, I think.

Q. Most of them were, were they not?

A. I don't remember just how many.

Q. The notice that was on Number Two was so written, was it not?      A. No, sir.

Q. Do you mean to say you wrote that notice on the ground?

A. There was part of it was written on the board and I filled it out on the ground.

Q. You filled it out?      A. Yes, sir.

Q. What did you fill it out with?

A. A lead pencil.

Q. Indelible?

A. I couldn't say whether it was an indelible or not.

Q. What part of it did you fill out?

A. I filled out the part giving the dates and the description of the ground and the names.

Q. Did anybody sign that as witnesses?

A. I don't remember whether any one signed it or not.

Q. Now, you saw McKinney locate Number Three Below that day, didn't you?

A. Yes, sir. [170—148]

Q. Where did McKinney put his location notice for Number Three Below, which end of the claim?

A. He put it on the upper end of the claim.

Q. And you saw Mr. Doyle locate his claim, Number Four Below, didn't you?

A. Yes, I was down there.

(Testimony of George L. Gates.)

Q. On which end of the claim did he put his notice?

A. I am not sure which end he did put it on.

Q. It could not have been on the lower end, could it? That goes into a canyon? Refreshing your memory as to the situation there, knowing there was a canyon there, can you state where that notice was?

A. I can't state positively but I believe his notice was on the lower end of the claim.

Q. What makes you believe that?

A. I think I seen it there.

Q. Were you there when he erected it?

Mr. LEEHEY.—We object to any further cross-examination concerning claim Number 4 Below Discovery; that claim is in litigation and to be tried here shortly—it is too remote.

Mr. DONOHUE.—The purpose of it is to show that all those claims excepting this particular one, the notices were all on the upper end—it is a circumstance.

Objection sustained. Plaintiff allowed an exception.

Q. Now, you saw Mr. Doyle locate that claim on the 6th?

A. I was there on the claim—I wasn't right by him when he was putting up his notice.

Q. Had there been any of these claims I have questioned you about located previous to your going there on the 6th? A. No, sir. [171—149]

Q. It was vacant ground on the 6th day of July?

A. Yes, sir.



(Testimony of George L. Gates.)

Q. There was none of those claims located?

A. None that I know of.

Q. Now, I would again like to ask you where you were on the 3d day of July—I haven't got a satisfactory answer to that yet.

A. I can't swear positively as to where I was on the third of July but I think I was on Little Eldorado, at the camp.

Q. Did you locate any claims that day?

A. On the 3d of July?

Q. Yes.      A. No.

Q. I will ask you, Mr. Gates, if it is not a fact that McKinney and Doyle and probably Nelson went over there to Big Eldorado on the third day of July, you not being present, and made these locations?

A. No, sir, I don't think they did.

Q. That is the best answer you can give on that question, is it?

A. I know they did not—I am positive that they did not.

Q. Now, Mr. Doyle filed a location notice for No. 4 Below Discovery in which he claims to have discovered and located same on the third day of July—would that changet your opinion any?

A. How is that?

Q. If Mr. Doyle has filed for record a notice of location wherein he sets out that he located No. 4 Below Discovery on Big Eldorado on the third day of July, would that change your opinion as to who located those claims when they were located?

A. No, sir. [172—150]

(Testimony of George L. Gates.)

Q. It would not?     A. No, sir.

Q. You are just as positive of that as you are to the contents of that power of attorney, are you?

A. Repeat that, please.

Q. I say you are just as positive regarding the location of those claims as you are to the contents of that power of attorney?     A. Yes, sir.

Q. And if you are mistaken in one you might be mistaken in both, might you not?

A. I don't know.

Q. Now, when you put up the corner posts at the lower end of your claim, right limit, what markings were there at that time?

A. When I put up my corner post?

Q. Yes, on the right limit of Number Two?

A. What markings were there?     There was none.

Q. There was no stake there at all?     A. No.

Q. When you put up the stakes at the upper corner on the right limit, was there any stakes there?

A. No, sir.

Q. When you put the stake up at the upper left

Q. When you put up the stake at the upper corner limit, was there any writings there?

A. No, sir, I didn't see any.

Q. And when you put your stake up at the lower end of the left limit, were there any markings there, stakes or otherwise?     A. No.

Q. Then you located this claim and when you located it the adjoining [173—151] claims on each side of you were not located?     A. No, sir.

Q. And you did that work actually yourself, the

(Testimony of George L. Gates.)

staking?     A. Yes, sir.

Q. And building the monument?     A. Yes.

Q. Now, you afterwards caused a notice of location to be recorded for this claim, No. 2 Below, did you not?     A. Yes, sir.

Q. Did you see that notice?

A. The notice of location?

Q. Yes. That was recorded?     A. Yes, sir.

Q. You know the contents of it?

A. Fairly well; it was a copy similar to the location notice posted on the claim.

Q. You have seen a copy of it from the record, haven't you?

A. I had a copy of it from the record.

Q. You got a copy of it from the record?

A. I had, but I haven't it now.

Q. You saw that notice before it was recorded—you prepared the notice, did you not?

A. Yes, I think so.

Q. You are positive you put your location notice on the lower end of the claim, are you?

A. I am positive I put the location notice on the lower end.

Q. Can you explain why you did that and the other claimants all put them on the upper end?

A. The only reason is that I stepped, measured the claim, from the upper end down and had the notice with me.

Q. Didn't all the boys do that, start in at Discovery and go [174—152] down the creek—Didn't they all put up their monument and notice first and

(Testimony of George L. Gates.)

then go down to the lower end of the claim. Didn't they all put up their notice of location and corner stakes and go down and put up their stakes there?

A. I think they did, most of them.

Q. That was done in all cases but yours?

A. I am not sure Doyle did that, but I think the rest of them did.

Q. When you prepared this notice of location for filing, you saw that it was correct, did you not?

A. I didn't examine it very carefully, no.

Q. You prepared it anyway, didn't you?

A. Yes.

Q. Examine that paper, please; that notice calls for 1320 ft. down the stream, does it not? (Handing witness paper.)

A. Yes, sir.

Q. And still when you prepared that notice, you placed the notice at the lower end of the claim, is that right?

A. Yes, sir.

Mr. DONOHUE.—We offer in evidence this certified copy of the location notice for the purpose of assisting the jury in arriving at where the notice of location was really placed upon the ground at the time the location was made.

Mr. LEEHEY.—We object to the introduction of that in cross-examination, but we offer a certified copy, the same certified copy, in evidence as part of our case—I would rather have it in the record that way.

Mr. DONOHUE.—I don't care whose copy is used—if this copy corresponds with mine, we have no objection to it.



(Testimony of George L. Gates.)

(It is admitted as Defts. Exhibit 4 and read to the Jury by [175—153] Mr. Ritchie. Copy is attached hereto and made a part hereof.)

Q. You heard that this ground had been relocated, did you not?     A. Yes, sir.

Q. While you were in the Shushana district?

A. Yes, sir.

Q. You didn't go over there to see about it, did you?     A. No.

Q. You sent McKinney over?     A. Yes, sir.

Q. Is McKinney interested in this ground too?

A. No, sir.

Q. He is not interested?     A. No.

Q. McKinney has no interest in the ground at all?

A. Not in that particular ground, no.

Q. That is just between you and Purdy?

A. Yes.

Q. You are positive you put up those corner stakes and not McKinney?     A. Yes, sir.

Q. You testified yesterday that you were working for Mr. James—when did you go to work for Mr. James?

A. I went to work for Mr. James about the 7th or 8th of July.

Q. Were you working in the cut, pick and shovel work?     A. Yes, sir.

Q. How long did you work there?

A. I worked there until about the 20th of July.

Q. Then you went to Steel Creek, did you?

A. No, I went to Beaver Creek.

(Testimony of George L. Gates.)

Q. Was that the first trip you made away from there after you first came? [176—154]

A. Yes.

Q. Then you were not in the Shushana region on the 27th of July? A. No, sir.

Q. You prepared this notice of location for record before you left, did you? A. Yes, sir.

Q. Signed the notice of location yourself?

A. Yes, I think so.

Q. You are positive of that, though, are you?

A. I am not positive whether I signed it or just wrote a copy of it.

Q. McKinney might have signed it?

A. Yes, he might have signed it.

Q. Both on the ground and on the one that was recorded—both the notice posted on the ground and the one that was recorded?

A. No, the notice posted on the ground I signed myself.

Q. You signed that yourself? A. Yes, sir.

Q. You are a man of considerable means, are you not, considerable property interests?

A. Not any too much, no.

Q. You are worth fifty or sixty thousand dollars?

A. Hardly.

Mr. DONOHOE.—That's all.

Mr. RITCHIE.—At this time I want to make a motion for the sake of the record to strike out all that part of the testimony regarding the contents of the alleged power of attorney upon the ground that both in his answers to the direct examination

(Testimony of George L. Gates.)

and cross-examination he showed that he had repeatedly [177—155] refreshed his recollection by consultation and reading and hearing read this copy and the motion is directed to the fact that his testimony therefore is not based upon the original document so much as it is upon the copy which is not produced here as a correct copy and is not shown by any evidence at all to be a copy.

Motion denied—plaintiff allowed an exception.

Mr. DONOHOE.—I want to ask the witness a few more questions.

Q. When were you last upon the ground in controversy, No. 2 Below on Big Eldorado Creek?

A. When I staked it.

Q. You never went back to it?      A. No, sir.

Q. You were there just on the 6th day of July, you claim?      A. Yes, sir.

Q. Never was there before or since?

A. No, sir.

Mr. DONOHOE.—That's all.

(By Mr. FINNEGAN.)

Q. Who did the annual labor work on that claim?

A. Mr. McKinney, Mr. Schultz, Mr. Kingwall and Mr. Atkinson.

Q. At whose request was it performed?

A. My request. It was performed in September.

Q. On the 6th day of July, how many men were in the Shushana region, if you know?

A. I think about six men.

Q. In the whole region?

A. Yes, as far as I know.

(Testimony of George L. Gates.)

Q. When did you leave the Shushana, in the fall?  
[178—156]

A. The 12th of October.

Q. How many claims did you locate as agent for Mr. Purdy or for others?

A. I located this Number 2 and a fraction on Bonanza in Mr. Purdy's name.

Q. Two claims, then, is the number of claims you located as agent or attorney for any other parties?

A. Yes, sir.

Q. Relative to the location of the claim No. 2 were you assisted by your companions in any of the location work? I will put it this way—did the men who accompanied you on that day assist you in any part of the location of the claim?

A. McKinney assisted me in building the center end monument, yes.

Q. Where did you obtain the stakes?

A. We obtained the stakes down the creek below, brought them up there.

Q. How far down?

A. I think about a quarter of a mile.

Q. Did you bring the stakes or did others assist you?

A. We all brought some stakes—I brought some and other parties brought some stakes.

(By Mr. DONOHOE.)

Q. You say there were six men in the whole Shushana region on the 6th day of July, is that right?

A. There was six men in that immediate neighborhood,—that is all I know of.



(Testimony of George L. Gates.)

Q. There were six men of your people from Dawson and Forty Mile? [179—157] A. Yes, sir.

Q. Carl Whitten was in there at that time?

A. Not at that time.

Q. He had gone to Copper Centre to record his notices, had he not?

Mr. LEEHEY.—We object as calling for a conclusion.

Objection sustained; plaintiff excepts.

Q. These men were yourself, James, Nelson, Doyle, McKinney and probably Johnson?

A. No, sir, Johnson was not there.

Q. I named the others, didn't I? A. Yes.

Q. You had been in the district how long on the 6th of July?

A. We arrived there on the 26th of June.

Q. And you all camped at the mouth of Little Eldorado, on Bonanza Creek? A. Yes.

Q. Did you ever hear of a place called Wiley at the mouth of Solo Creek? A. No.

Q. You didn't know the Court had fixed that place as the headquarters of the recorder? A. No, sir.

Q. You don't know what men were over in that section, do you? A. No, I do not.

Q. You don't know the men that were camped down at the mouth of Bonanza, do you, about two miles and a half from Little Eldorado?

A. I didn't know there was anybody there at all.

Q. Did you know a man named Hertzberg there? [180—158] A. No, sir.

Q. You didn't know five or six others? A. No.

(Testimony of George L. Gates.)

Q. You are basing your opinion of the men that were there by the men that were at the James camp?

A. That is all the men I knew, yes.

Q. How much of the territory had you gone over previous to the 6th day of July?

A. I had been pretty well all over it—I had been over Bonanza Creek, Johnson Creek, Wilson Creek, Glacier—I had been pretty well all over the camp there.

Q. And the six members of your *part* from across the line are the only ones you knew in that section?

A. Those are the only ones I know of, yes.

Q. Carl Whitten had no men at his place?

A. I didn't see none there.

Q. Charley Hanson was not there, Whitten's partner? A. I didn't see him.

Mr. DONOHOE.—That's all.

Witness excused. [181—159].

[**Testimony of Howard H. Fields, for Defendant.**]

HOWARD H. FIELDS, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. LEEHEY.

Q. What is your name? A. Howard H. Fields.

Q. What is your place of residence?

A. Salt Lake City.

Q. What is your occupation?

A. Mining engineer.

Q. Were you in the White River of Shushana region of Alaska in the summer of 1913? A. I was.

Q. In your professional capacity?

(Testimony of Howard H. Fields.)

A. In my professional capacity.

Q. State in a general way your familiarity with the district and what you did in order to become familiar with it.

A. In May, 1913, I left White Horse, crossing the Donjak River to the head of the White, or the mouth of the North Fork, and in July I came to Cordova, coming over the Chetistone and returned in the last days of July, leaving the North Fork of the White July 29th I came into the Shushana and spent the last day of July and the months of August, September, October and November in the Shushana.

Q. During that period did you travel about the various creeks?

A. During that period I spent the majority of my time traveling about the creeks.

Q. How many creeks in the so-called Shushana diggings did you visit?

A. I think I visited them all.

Q. State, without revealing any professional confidences, in a [182—160] general way the purpose of your inspection at that time.

A. The purpose was to gain data, to gather data, for a map of the district—in fact the majority of my time was spent in pacing the claims, taking notes on the different location notices that were posted, observing the geology, getting data for a map that would cover the district both as to geology and claims, the dates they were located—I think that covers it—contours.

Q. You have prepared such a map?

(Testimony of Howard H. Fields.)

A. I have prepared such a map.

Q. Did you visit all the principal creeks?

A. Yes.

Q. State whether or not you have examined the monuments, corner markings and stakes of the various claims.

A. The major portion of my time was spent examining the center monuments, that is, the routine of the work was more or less as follows: To start at the head of the creek with the use of a compass and pace the center line of the claim, taking the direction of it with a compass, making a note of it and examining the geology on both sides of it.

Q. State whether or not you examined a large number of the corner monuments, corner stakes I will say, of the claims.

A. During the time I was there I examined a large number I should say.

Q. Now, it is a fact, is it not, that a great many of those stakes, particularly the early locations, were willow stakes?

Mr. DONOHUE.—We object to that unless confined to the claim in controversy.

Objection overruled; plaintiff excepts.

A. It is a fact that the major portion of the country that was staked was above the line of spruce timber and willow stakes [183—161] were the handiest and naturally were used in the majority of cases.

Q. State the fact as you learned from your inspection in the district as to the legibility of markings on willow stakes after they have been in position and



(Testimony of Howard H. Fields.)

subject to weather conditions a period of time—state the result of your inspection as to the effect of weathering and the different periods of time of weathering.

Mr. DONOHUE.—We object to that unless it is confined to the claim in question.

Objection overruled; plaintiff excepts.

A. My experience was with willow stakes, when I first went in there, they were careless about cutting the bark off the willow stake; if the bark is not entirely removed to the sap wood, the remaining bark turns brown and unless marked with a pencil so the cut was made very legibly, with a soft pencil, within a month it would become almost illegible. If the stake was cleaned off entirely, the sap cut and allowed to dry, then it would take a marking of almost any soft pencil, but unless all the bark was removed, it would always turn brown as soon as it dried.

Q. Is that true where the face of the stake was shaved off?

A. It depends on the depth of the shaving.

Q. What effect would it have where the bark was left on the remaining portion?

A. The portion of the stake would only be effected where the bark was partially removed,—the bark remaining on the stake not touched would take a much longer period to turn brown.

Q. If a willow stake cut green was shaved on two sides and [184—162] markings there placed, the bark left on the stake and the stake set in the

(Testimony of Howard H. Fields.)

ground in its green condition, what from your observation and experience in the district would be the length of time which that lead pencil mark would remain legible, assuming that it would be marked with an ordinary lead pencil?

A. The length of time would vary with the hardness of the lead pencil—it would have to be a very soft pencil to have it remain,—well, two months would be a long time unless it was marked very distinctly and very heavily originally.

Q. Ordinarily would it last that long?

A. No, it would not,—I don't think it would.

Q. Would it last as long as from July 6th to August 30th, in your opinion?

A. With the same reservation, if it wasn't marked very legibly, it would not.

Mr. LEEHEY.—That's all.

Cross-examination by Mr. RITCHIE.

Q. If the bark was well removed and the outer wood where the sap carries were shaved pretty smooth and straight and written heavily with a soft pencil, would it carry that marking two or three months? A. I should say it would.

Q. It depends after all, does it not, on the shape the wood was in, the condition of the wood, at the time and the markings with the pencil and to some extent on the character of the lead that was used?

A. Yes.

Q. So that you cannot lay down a general rule,—every particular [185—163] piece and marking on it would have to stand on its own circumstances?

(Testimony of Howard H. Fields.)

A. But I should say if a green willow stake was taken and all the bark was not removed in all cases it would turn brown.

Q. But suppose all the bark is removed and the smooth part of the outer wood so that there is a plain surface and that is marked distinctly, how long then would the marking with the lead pencil writing continue and be legible?

A. If the wood is cut in past where,—past the place where the sap—where there is more sap than there is in the hard wood and it is marked very legibly with a soft pencil, it is my opinion it would stay three months at least.

Q. In these posts you noticed did they very generally peel the bark off or did a great many of them have a smooth, flat face?

A. The first posts put up there were, I should say, very poorly peeled.

Q. If the posts were shaved down, it would carry the mark a good while?

A. With the reservation that the pencil writing was placed there originally?

A. Are there a great many dry or comparatively dry willow trees there?

A. Not a great many.

Q. Do you know if any of those were ever used?

A. They were at times but they were very much harder to peel.

Q. Did you ever examine the stakes on these claims on Big Eldorado Creek?

A. Merely in a superficial way, passing by them.

(Testimony of Howard H. Fields.)

Q. Have you any recollection as to whether all of them were [186—164] pretty plainly faced?

A. My recollection of the stakes on Big Eldorado was that they were very small ones and not particularly well faced as I remember it.

Q. You have no recollection as to the exact depth to which they were shaved off? A. No, sir.

(By Mr. LEEHEY.)

Q. You also include the reservation in your answer to Mr. Ritchie's question as to the length of time they would remain legible, three months, that they must be written with a soft pencil?

A. Yes, sir.

Q. If written with a hard pencil would it remain three months? A. It would not.

Q. If written with a medium hard pencil, it would remain proportionately, I presume?

A. Proportionately, yes, sir. The fact of the case is with a harder pencil the lead doesn't come off, it merely crushes the fibre of the wood and for a few moments it looks fairly legible, but the rain will wash it right off.

(By Mr. RITCHIE.)

Q. How about an indelible pencil?

A. I don't remember seeing any stakes marked with an indelible pencil.

Q. If a man made the letters by boring down pretty hard on the pencil, so as to cut into the wood a little bit, would that fill it with lead and carry longer? [187—165]

A. It would have to be pretty soft.



(Testimony of Howard H. Fields.)

Q. Is the wood hard?

A. No, it is pretty soft.

Q. It is a soft, spongey wood?      A. Yes, sir.

Mr. RITCHIE.—That is all.

Witness excused. [188—166]

[**Testimony of W. E. McKinney, for Defendant.**]

W. E. McKINNEY, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. LEEHEY.

Q. What is your name?      A. W. E. McKinney.

Q. What is your place of residence?

A. Forty Mile.

Q. How long have you lived in this northern country?      A. About twenty-two years I think.

Q. What is your occupation?      A. Miner.

Q. What character of mining have you followed?

A. Placer mining.

Q. Exclusively?

A. Well, since I have been here I have done no quartz mining.

Q. During the last twenty-two years you have followed placer mining exclusively.

A. Yes, while I was mining.

Q. You have not engaged in any other mining business?      A. No.

Q. You have followed prospecting?      A. Yes.

Q. Have you followed prospecting a great portion of that 22 years?      A. Quite a lot, yes.

Q. Do you know the defendant F. W. Purdy of Forty Mile?      A. I do.

(Testimony of W. E. McKinney.)

Q. Do you know Mr. G. L. Gates who has just testified? A. Yes, I do.

Q. Where were you in the latter part of May, 1913? [189—167] A. I was in Forty Mile.

Q. When did you leave there?

A. I left there on the evening of the 30th I think or 31st of May—the 30th or 31st of May, I think it was the 31st, three o'clock, between 2 and 3 o'clock.

Q. What was the occasion of your leaving there and where were you going to?

A. Going on a prospecting trip.

Q. What occasioned you to leave at that particular time, anything special?

A. Yes, I had a letter Nelson had written to Mr. Gates, that he had a prospect and told us to come up and meet him in Dawson.

Q. Where had Nelson written from?

A. From Dawson.

Q. To Gates at Forty Mile? A. Yes.

Q. How long previous to the 31st of May had such letter been received?

A. I think it was somewhere about the 28th or 27th.

Q. Then you left on the first boat following?

A. Yes.

Q. Accompanied by whom? A. Mr. Gates.

Q. Do you know anything concerning a certain power of attorney from Mr. Purdy to Mr. Gates having been executed in Forty Mile on or about the last days of May? A. I do.

Q. Without stating the contents of that, state in a

(Testimony of W. E. McKinney.)

general way what you know about its execution at that time? [190-168]

A. It was executed in Forty Mile on or about the 30th, I think, the 30th day of May.

Mr. DONOHUE.—We move to strike the answer as not responsive to the question and being a conclusion.

Motion denied; plaintiff excepts.

Q. State what you know about its execution.

A. This power of attorney was executed there in Forty Mile.

Q. How do you know that—what did you see done, yourself? A. Why, I witnessed it.

Q. At whose request? A. At Purdy's.

Q. Was there any other witness?

A. McDonald of the store.

By the COURT.—Who signed this power of attorney and to whom did it run?

A. To Gates, empowering him to locate mining ground in Alaska.

By the COURT.—Signed by whom?

A. Signed by myself and McDonald.

Q. In what capacity? A. As witnesses.

Q. Who signed it? A. Frank W. Purdy.

Q. And the power of attorney ran to whom?

A. To G. L. Gates.

Q. Do you know whether the document was executed before any magistrate, notary public or other officer? A. It was.

Q. Who? What magistrate? Give his name and official title? A. Captain McLeod of Forty Mile.

(Testimony of W. E. McKinney.)

Q. And what is his official title? [191-169]

A. He was a notary public for taking affidavits and acknowledgment in Yukon Territory.

Q. Where did he reside? A: In Forty Mile.

Q. Now, did you accompany Mr. Gates to Dawson?

A. I did.

Q. You may state what you did after arriving there with reference to a prospecting trip in Alaska.

A. We met Nelson, I think, the first day of June, at five o'clock in the morning when the boat landed and we got our outfit and took passage on the boat to the mouth of—that was the second, I think—Stuart, near the mouth of Stuart; from there took a poling boat and poled up to White River, what was known as San Pete Bar and there met Doyle and Taylor with pack horses.

Q. Who was in the party that poled up the river?

A. Me and Nelson and Gates.

Q. And where were Doyle and Taylor coming from when you met them at San Pete Creek?

A. They were coming from Coffee Creek, they had taken a boat and were coming overland.

Q. They were also en route from Dawson?

A. Yes, sir.

Q. And you met by appointment? A. Yes, sir.

Q. What did you do then?

A. We took the pack horses and from there proceeded to the diggings.

Q. You refer to the Shushana diggings?

A. Yes, sir. [192-170]

Q. When did you arrive there?



(Testimony of W. E. McKinney.)

A. I think it was on or about the 26th or 27th of June, 1913—we had no calendar.

Q. How long did you remain in the Shushana region continuously from that date?

A. Up until September some time, somewhere along the 12th or 10th.

Q. Where did you go then?

A. I went from there to Dawson and from there to Forty Mile.

Q. During that period that you were in the Shushana, from the latter part of June until the latter part of September did you do any prospecting?

A. I did.

Q. Did you locate any mining claims?      A. I did.

Q. Did you become familiar in a general way with the creeks in that country?      A. I did.

Q. Do you know from personal knowledge the creek commonly designated as Big Eldorado Creek?

A. I do.

Q. Did you locate any mining claims yourself on that creek?      A. I did.

Q. What claim did you locate?

A. I located Number One Below Discovery and Number Three.

Q. You located those claims for yourself or as attorney in fact for others?

A. I located as attorney in fact for others, A. P. Schultz and Aleck Kingwall.

Q. What day did you make the location? What day did you make your discovery and post the notice and stake?      A. July 6th. [193—171]

(Testimony of W. E. McKinney.)

Q. Who was present on that occasion?      A. Nelson, Doyle, myself and Gates.

Q. Where were you camped at that time?

A. We camped on Little Eldorado,—at the mouth of Little Eldorado, on Bonanza Creek.

Q. How many people were in the immediate vicinity at that time, in what is known now as the Shushana diggings?

A. There was ourselves, that is all I know of at that time—the party that went in.

Q. Who else besides the party of four you have just named?

A. Besides the four there was Taylor and James.

Q. Were there any other men in the district at that time?      A. Not to my knowledge.

Q. On what day was it you said you made this discovery and staking of those claims?

A. 6th day of July.

Q. State how you came upon the ground and where you came from and when you came?

A. Came from the mouth of Little Eldorado on the 6th of July.

Q. The morning of that day, I presume?

A. Yes, left in the morning.

Q. When did you arrive on Eldorado Creek?

A. I should judge it takes probably two hours to go over—probably about ten o'clock we arrived there, between 9 and 10, maybe later possibly—I don't know exactly.

Q. Did you do any prospecting then?

A. I did—such as panning.

(Testimony of W. E. McKinney.)

Q. Did you observe any prospecting done on the ground which was subsequently located as number 2 Below Discovery?

A. Yes, I noticed the crowd panning up and down the creek at different [194—172] points where bedrock would stick out and show up particularly.

Q. I am asking particularly as to prospecting and work done on that ground.

A. Gates was panning on it, yes.

Q. Did you witness his panning?      A. Yes.

Q. State the results he obtained.

A. Probably three or four colors, maybe more, and black sand.

Q. You have prospected a great many years and located placer mines?      A. Yes.

Q. State whether in your opinion the indications of gold or the actual gold obtained were such as would justify a prudent man spending further time and money in the development of the ground.

A. I think it was sufficient, yes—I consider it so.

Q. Were the indications such as would indicate that profitable mining might be developed?

A. It was.

Q. Now, I wish you to describe to the jury in detail just how the party proceeded to stake and locate mining claims on that creek, on that day.

A. We all went over in a bunch together, the four of us, and it had been common with us there to stake, in fact the timber being scarce, the way we staked our ground then was, we used the posts between, one would use the upper half and the other the lower half

(Testimony of W. E. McKinney.)

of the post; on the upper end we would say the upper limit or lower limit as it happened to be, that would be to designate one claim and the other side the other, instead of all using double sets of stakes; the stakes were scarce and only willows and very [195—173] small and that was the way we staked; and we would build our monuments that way also; we built a pyramid of rock, we all built together, two or three might be building one and the others staking—we build a monument like that and we would each use that as a monument—that would designate the lower end of one claim and the upper end of another and stake it accordingly; we didn't all build separate monuments and I don't think there was a claim, I am positive, on the creek that had two monuments until after other parties got in and got placing them.

Q. State just what you mean by the monuments as distinguished from stakes—explain to the jury what part of the claim is marked by a monument.

A. They would use them as the lower end—it would be used as the lower centre end of say Number One Below Discovery and he would build a monument here Claiming Discovery, a monument of rock 1320 feet down or up stream; then we would build another monument and you might claim from that then down 1320 feet—I could go and locate and he did; that is the way I located and all of us located in that way, claiming 1320 feet from the other monument up, as it happened to be.

Q. And on what part of the claim was the stakes placed you have just described?



(Testimony of W. E. McKinney.)

A. They would be placed at the corners, describing the limits and corner stakes on each limit; they would commence say at the lower end on the right limit; that would be designated as lower corner stake on left limit of whatever claim it was, two or three; the upper side would be for one and the lower side for the other.

Q. This was the method pursued by your party on that day, July 6th,?      A. It was.

Q. You may state, then, further, how you marked the corner—the stakes you have indicated as the corner monuments? [196—174]

A. Do you want me to define how this particular claim was or the custom?

Q. I am asking for the general custom first.

A. Say this is the lower stake on the left limit of the creek—we would **call that the lower stake** on the left limit of No. Two Big Eldorado; then over on the other side we would call it the lower corner stake on the right limit of Big Eldorado Creek, and so with the upper ones.

Q. You say you would call it that?

A. Yes, sir.

Q. What, if you know, was the practice of your party with reference to marking?

A. To write it that way.

Q. How was it written?

A. Written that way—it was written that way.

Q. By what method?      A. Lead pencil.

Q. First describe what was done to the stake.

A. The stakes were willow stakes—

(Testimony of W. E. McKinney.)

Mr. DONOHOE.—Is he referring now to the markings on No. 2 Below?

Mr. LEEHEY.—It is the general method pursued.

Mr. DONOHOE.—We object; the testimony should be confined to this claim.

Objection overruled; plaintiff allowed an exception.

Q. State in a general way the size and character of these stakes.

A. About the largest stakes we could get, the largest willows we could get, we would get them, two or three feet long—some would taper so fast—

Q. Were they all willows? A. Yes, sir.

Q. And about what thickness? [197—175]

A. Well, the largest I guess we could get wouldn't exceed two inches.

Q. And the smallest you would use?

A. About an inch and a half.

Q. About how long? A. About three feet.

Q. How high would you set them above the ground?

A. They wouldn't go into the ground very deep, probably three feet above the ground.

Q. Now, I believe you stated that you located Number One Below Discovery on Big Eldorado Creek. A. I did.

Q. You may describe to the jury your lower monument on that claim, if you have a lower centre monument.

A. It was built of rock, about three feet I should judge, across the base and about three feet high, pos-

(Testimony of W. E. McKinney.)

sibly 21½, of boulders picked up there in the creek.

Q. State whether that was also used as a monument for another claim.

A. It was used as the lower centre stake of Discovery, centre end stake.

Q. You are describing the monument on the upper end of your Number One?     A. Yes.

Q. Describe the monument on the lower end of your Number One.

A. It was built the same, about three feet high, or two feet and a half across the base.

Q. Built of rocks?     A. Yes, boulders. [198—176]

Q. State whether that was used also as a monument for another claim.

Mr. DONOHOE.—We object to that as leading.

Objection overruled; plaintiff allowed an exception.

A. It was used at the centre end stake of Mr. Gates—we had a willow stake.

Q. What centre end stake of his?

A. The upper.

Q. Do you know of your own knowledge that Mr. Gates located that claim on that day?     A. I do.

Q. How do you know?

A. I was there with him personally.

Q. Did you see him establish his monument?

A. I did.

Q. State what monuments Mr. Gates established.

A. He established this monument, the monument below—it would be 132 feet from my monument.

(Testimony of W. E. McKinney.)

Q. Describe that monument.

A. Well, it was built of rock, the same as the other, about two feet and a half or three feet at the base and about three feet high.

Q. State what further was done, if anything.

A. He wrote a notice and placed that on a board about, I judge, 16 inches long, or 18.

Q. Did you see that notice?     A. I did.

Q. Do you remember how it was signed?

A. He signed his name to it, I think; I didn't see it particularly, I didn't look at it close to see.

Q. Where was the notice placed?

A. It was placed on the lower end of the claim.

[199—177].

Q. Are you positive what end of the claim it was placed on?     A. Yes, the lower end.

Q. The lower end of what claim?

A. The lower end of Number Two claim on Big Eldorado Creek.

Q. Below Discovery or Above?

A. Below Discovery.

Q. You are positive then that the discovery notice or the location notice of placer mining claim Number Two Below Discovery on Big Eldorado Creek was placed—on which end of the claim?

A. On the lower end.

Q. And you saw it placed there?     A. Yes, sir.

Q. On what day?     A. On July 6th.

Q. What year?     A. 1913.

Q. Describe the notice to the jury, how it was written, whether on a board or paper or otherwise.



(Testimony of W. E. McKinney.)

A. It was written on a board and it stated claiming—it was written in the regular form—1320 feet up stream for mining purposes and dated—I suppose he put his name to it, his name is on it anyway, his name is signed to it anyway, or it was the last time I saw it and I think witnessed by one of us—I don't know which one.

Q. Was that written on a paper?

A. On a board; the board was about 16 inches long and about four inches wide—written with a lead pencil.

Q. State the character of the board, was it rough or smooth?

A. It wasn't very rough; it was a smooth board such as a milk case would be or something of that kind—I think it was a piece off [200—178] of a milk or fruit case.

Q. Did Gates establish any monument at the upper center end? A. He put a stake in my monument.

Q. He used your lower monument on Number One?

A. Yes.

Q. Did you see Gates establish his corner?

A. I did.

Q. Now, describe to the jury how they were established, what they consisted of and how they were marked.

A. They consisted of a willow stake, flattened on both sides, I think, and were about two feet and a half or three feet long,—about three feet long, standing about three feet out of the ground, possibly  $2\frac{1}{2}$  and they were marked as I before stated.

(Testimony of W. E. McKinney.)

Q. Describe to the jury just how they were marked by Mr. Gates, if you know.

A. They commenced on the left-hand limit, I think—I don't know which limit, I am not positive which side but he described them as I have said before—commenced on the left-hand limit of the creek and called this the lower post, lower corner post of Big Eldorado Creek, left limit.

Q. How did he mark that post?

A. With a lead pencil.

Q. And what did he write on there with the lead pencil?

A. He wrote on it Number One stake left limit of Big Eldorado Creek.

Q. Do you remember whether he gave the numbers?

A. The lower stake,—I don't remember whether he put the number of the stake on it or not; the lower corner stake, I think that is what he put on, I didn't watch him write it but I think that is what he put on—that is what they had been putting on.

Q. Did you read it after it was written? [201—179]

A. I didn't read all the stakes.

Q. Did you read any of them?

A. I did; to the best of my knowledge that is the way it was written, describing it as the corner stake on the left limit of Number 2 Eldorado Creek, lower corner stake.

Q. You say you didn't read all the stakes?

A. No.

Q. Didn't you stake the claim above it?

(Testimony of W. E. McKinney.)

A. I did.

Q. State whether you used the same stakes or established others.

A. I joined to him on the upper end.

Q. What do you mean by joined?

A. I wrote my location notice on them.

Q. I am asking whether or not you had the same stakes for your claim above and your claim below.

A. I did.

#### AFTERNOON SESSION.

Q. Were there any markings on those stakes?

A. There was.

Q. What markings?

A. Markings that I made, and Gates.

Q. And for what purpose did you make markings on those stakes?

A. To designate my lower corner of Number One Below Discovery.

Q. You may state what markings you placed on those stakes yourself—I refer now to the stake on the upper corner of No. 2 right limit.

A. I called that the lower stake of Number One.

Q. What you wrote I want.

A. I marked it corner stake left limit of No. One Below Discovery.

Q. Now, then, what markings, if any, did you place upon the corner [202—180] stake which marked the upper corner of Number 2 Below on the right limit—did you place any markings on the stake which marked the corner of Number Two Below Discovery on the Big Eldorado Creek on the right limit, the

(Testimony of W. E. McKinney.)

upper corner on the right limit?

A. You mean the lower end of the claim? Of Number One?

Q. No, I am referring to the stake at the upper end of No. 2, on the right limit—did you place any markings on that stake? A. I did.

Q. What markings?

A. It was the lower corner, right limit, Number One Below Discovery on Big Eldorado Creek.

Q. You wrote that on the stake, did you?

A. I did.

Q. Now, then, did you place any markings on the stake which marked the lower corner of Number Two Below on the right limit—did you place any markings on that stake? A. I did.

Q. What markings?

A. That would be the upper corner on the right limit of Number 3 Eldorado, on the right limit of Big Eldorado.

Q. Did you mark that stake for that corner?

A. I did.

Q. Did you place any markings on the corner stake which indicated the lower corner of Number Two Below Discovery on Big Eldorado on the left limit?

A. I did.

Q. What markings did you place on that?

A. I called that the upper corner of Number 3, left limit.

Q. State what markings you wrote on the stake.

A. I wrote those markings.

Q. You are positive you wrote those markings on



(Testimony of W. E. McKinney.)

all four stakes? [203—181]. A. Yes.

Q. How did you write them?

A. With a lead pencil.

Q. All those four stakes were set by Gates, I believe? A. Yes, sir.

Q. And you adopted them for the corners?

A. Yes, sir.

Q. When you made those markings, state whether you saw any markings placed thereon by anybody else. A. I did.

Q. State what they were.

A. They were marked somewhat the same as mine—the one I seen, his corner post, described his corner on certain limits.

Q. By whom was it marked?

A. By Mr. Gates.

Q. Did you see him mark them?

A. I see him mark some of them.

Q. Did you read his markings?

A. Some of them.

Q. You didn't read all of them?

A. No, sir, not particularly.

Q. Are you positive he had markings on any of the stakes? A. I think he had them on all of them.

Q. Are you positive he had them on any?

A. I am.

Q. Now, I believe you stated those stakes were blazed on two sides? A. Yes, sir.

Q. Were those the same stakes you cut that morning? A. Yes, sir.

Q. From where did you obtain the stakes, or Gates,

(Testimony of W. E. McKinney.)

or whoever did obtain them? [204—182]

A. In the valley of the creek, Big Eldorado.

Q. Where with reference to the claim designated as Number 2? A. Below it.

Q. About how far?

A. I think they were on Number 3, about Number 3, where we could get a large bunch of willows.

Q. When were they cut? A. That day.

Q. Were they green stakes or dry?

A. They were green.

Q. When were you last on the claim designated as Number Two Below Discovery?

A. I don't remember just exactly the date, but somewheres along about, I should think, the 5th or 6th of September.

Q. Had you been on the claim frequently in the meantime? A. I had.

Q. About how many times, approximately, in a general way?

A. Along the latter days of August I first went over it—I don't remember the date exactly.

Q. Did you do any work on the claim?

A. I did.

Q. What work?

A. I done the representation work.

Q. Now, when you were there on those last occasions did you observe the stakes set by Gates as the corner monuments? A. I did not.

Q. When did you last notice the stakes?

A. When we left the creek, after staking them, setting the stakes.

(Testimony of W. E. McKinney.)

Q. You never examined the stakes after that?

A. I didn't see any to examine. [205—183]

Q. Now, when was it that Gates left on his trip down to Beaver Creek, the international boundary?

A. It was about the 22d of July, I think.

Q. Referring to the power of attorney which you say was executed by the defendant Purdy to Gates and which you signed as a witness—when do you recall next seeing that power of attorney after your signature as a witness?

A. On Eldorado Creek or on Bonanza, at the mouth of Eldorado Creek.

Q. About what time?

A. About the 26th I think, the 25th or 26th, I should judge.

Q. When with reference to the time Gates left for his trip?

A. Four or five or six days, maybe a week.

Q. You and Gates were camping together, I believe? A. We were.

Q. What was the occasion of your seeing the power of attorney on that date?

A. I was taking it to Morgan to have it filed for record.

Q. How did you come to do that?

A. Through request of Gates.

Q. State whether you read that power of attorney on that occasion? A. I did.

Q. Do you remember in a general way at least, or specifically, its contents?

A. I remember part of it.

(Testimony of W. E. McKinney.)

Q. State what it contains as accurately as you can remember the same?

Mr. DONOHOE.—We object to the testimony on the ground that it is not the best testimony and the record speaks for itself and for all the reasons mentioned in the objection made to the testimony of Gates.

Objection overruled—plaintiff allowed an exception. [206—184]

Mr. LEEHEY.—The defendant understands that all this testimony as to the power of attorney goes in under the same objection and exception.

A. It was a power of attorney from Purdy empowering Gates to locate and record mining claims in Alaska, drawn up in the usual form of powers of attorney.

Q. Was it in writing? A. It was typewritten.

Q. State whether it was signed by anybody; if so, by whom. A. It was signed by Frank Purdy.

Mr. DONOHOE.—We object to that as leading.

Objection overruled—plaintiff excepts.

Q. Did it bear the signature of anybody else?

A. It did.

Q. State who and in what capacity?

A. Witnessed by myself and McDonald, acknowledged before Captain McLeod.

Q. Who is Captain McLeod?

A. He is a notary for taking affidavits in the Yukon Territory, the customs man.

Mr. DONOHOE.—We move to strike out the last answer as not the best evidence as to whether Mr.



(Testimony of W. E. McKinney.)

McLeod was a notary or not.

Motion denied—plaintiff allowed an exception.

Q. State whether these signatures all appeared on the document at the time you delivered same to the recorder for record?

A. They did also the Consular's.

Q. What about the Consul—state fully the facts as to that.

A. It was the Consul's certificate stating he knew McLeod to be a notary for taking affidavits and acknowledgments in the Yukon Territory, with his seal and two dollar stamp attached. [207—185]

Q. What seal do you refer to?

A. Mr. Cole's, the American Consul at Dawson.

Q. Consul for the United States? A. Yes, sir.

Q. Were there any seals on the document?

A. His seal was there.

Q. Were there any others?

A. And McLeod's, two seals anyway—I don't know whether it was McLeod's now, I don't remember but there were two seals.

Q. You are now describing the document as it was when you delivered it to the recorder for record?

A. Yes, sir.

Q. State what else you did with reference to the recorder—state what you did at the recorder's office with reference to this document.

A. Gave it to Mr. Waller to have it recorded.

Q. Did you do anything else?

A. He didn't return it to me.

Q. He didn't return it to you—at that time did

(Testimony of W. E. McKinney.)

you do anything else? Did you do anything with reference to the payment of fees?

A. Sure, I paid the fees.

Q. Who was Mr. Waller?

A. He was a deputy of Mr. Morgan's.

Q. And who was Mr. Morgan?

A. Morgan was the recorder, supposed to be the official recorder that was appointed from this district and sent over.

Q. The White River recording district?

A. Yes, sir.

Q. On what date was this done?

A. It was about the 27th or 26th, somewhere along there—that is [208—186] the date I gave them to him—I received them on the 29th back.

Q. State the condition of the document when you received it back in reference to its condition when you delivered it—any changes in it?

A. Nothing more than that there was an affidavit of the recorder on the back of the time it was recorded.

Q. Did you say affidavit?

A. Well, it was a statement on the back of it—the same as all the location notices.

Q. State the contents of that statement on the back.

A. It said recorded and filed, and gave the date and hour and book and page—I don't remember just what book it was, by request of W. E. McKinney.

Q. Was there any signature?

A. Yes, it bore the signature of Mr. Waller.

(Testimony of W. E. McKinney.)

Q. State the fact whether it bore any other signature than that of Mr. Waller.

A. I think it bore also what's his name's signature too; I am not positive.

Q. Who do you mean?     A. Mr. Morgan.

Q. The recorder?     A. Yes.

Q. What did you do with that document?

A. I *turned* it to Mr. Gates.

Q. When?

A. When he returned from San Pete Bar.

Q. Did Mr. Gates ever return it to you?

A. No, sir.

Q. Do you know where the document is now?

A. I do not. [209—187]

Q. Did you hear the testimony of Mr. J. J. Ford, a witness on behalf of the plaintiff in this action?

A. I did.

Q. Do you recall having a conversation or conversations with Mr. Ford on or in the immediate vicinity of claim #2 Below Discovery on Big Eldorado Creek during the last days of August, 1913?     A. I do.

Q. You may state to the jury just what occurred, beginning with the first conversation; begin with the first conversation you had with reference to this property at any time or place and state the facts and circumstances of that conversation?

A. The first time I met Ford it was on Eldorado Creek, a tributary of Bonanza, along in August.

Q. You refer to Little Eldorado?

A. Yes, sir, I refer to Little Eldorado, a tributary of Bonanza, probably along about the—I don't know

(Testimony of W. E. McKinney.)

the date, probably the 20th, anyway the first time I met him was over there, on Bonanza Creek, at the mouth of Little Eldorado, and I didn't know him and he told me then who he was, made himself known and he asked me for a lay on Number Two Below Discovery on Big Eldorado. I told him that it didn't belong to me, I told him who it belonged to and asked him if he was acquainted with him and he said he was not and I said he ought to know him, he had been around Forty Mile quite a while and I told him to go and see him and he asked me if I would see Gates and see if there would be a show for him to get a lay; and I asked him about what would be fair and I told him about 60% and he said he would see his partner and went off and I didn't see him any more until I went over to do the representation on or about the last days of August; [210—188] he was working on the ground; I spoke to him and asked him what he was doing there; representing the claim; would he agree to do the representation work if I would give him a lay and prospect the ground, and he said, No, they had staked it and found it to be a fraction, there was no stakes or anything there at all on this ground and he went on to tell me that he was not jumping the ground, it wasn't his practice to jump it, and I asked him who staked it and he said a man named Sutherland, his partner, and he was doing the representation work. I had no more talk with him much that day but I came back over, I think it was the next day probably, the following day, and had another talk with him and he still con-



(Testimony of W. E. McKinney.)

tended that the claim was not staked and showed me where the location notice was, that it was on the upper end of the claim instead of the lower end, on the upper monument and I talked to him and told him that I thought he was jumping the ground; he still maintained he was not jumping it, he was locating it as an independent fraction; so I told him that this notice likely had been moved up by someone; he spoke up and asked me if I thought he had moved it; I said no, I wasn't particularly accusing him of taking it up, I didn't think he was strong enough, words to that effect, something like that but it might possibly have been moved by squirrels, I didn't think he would take it at all, and so a few days after that his partner—I think the next day—Sutherland came along; he also had a talk with me with reference to it and I explained to him and told him how the claim was staked and located and he asked me where this man was; I told him he was over on Gold Run.

Q. What man?

A. Mr. Gates, who claimed the claim. That was about all the conversation I had with him. He contended the ground had never been [211—189] staked at all, that he wasn't jumping it, it was an independent fraction, an open piece of ground—the Surprise Fraction I believe he called it.

Q. Did you ever have any conversation with Mr. Ford concerning the possibility of his obtaining a lay on this ground, after that first conversation?

A. No, I did not.

(Testimony of W. E. McKinney.)

Q. Did you do anything concerning the location notice after Mr. Ford showed it to you at the upper end of Number Two?     A. I did.

Q. State what you did.

A. I took that down, moved it down, in the presence of a man, in the presence of two men, to the lower monument between Two and Three.

Q. Where did you place it with reference to where it was originally placed by Mr. Gates?

A. The same place.

Q. When was this done by you?

A. It was done, I think it was the second—the latter part of August or the first of September—I don't remember just the exact dates.

Mr. LEEHEY.—That will be all.

Cross-examination by Mr. DONOHUE.

Q. Do you know what date of the month and what month you went upon that ground after Sutherland had located it as the Surprise Fraction?

A. I think it was the latter days of August.

Q. You can't fix the date?     A. Yes, sir.

Q. What date was it?     [212—190]

A. I don't know the exact date.

Q. It might have been the second or third of September?

A. No, I don't think it was, not that late.

Q. Not as late as the second of September?

A. No.

Q. You are positive of that?     A. Yes.

Q. You testified that that notice was at the lower end originally, when put up by Mr. Gates?

(Testimony of W. E. McKinney.)

A. Yes, sir.

Q. Where was your notice for Three, the monument?     A. Also on that same monument.

Q. You put your location notice for Number 3 at the upper end of Number 3?     A. Yes, sir.

Q. When did you first see this power of attorney?

A. I first saw this power of attorney in Forty Mile.

Q. That is in the Yukon Territory?     A. Yes.

Q. How long have you resided in Forty Mile?

A. I have resided in Forty Mile off and on 22 years.

Q. What is your business there?     A. Miner.

Q. How much of that time have you been in the saloon business?

A. I haven't been in the saloon business?

Q. You have never been in the saloon business in Forty Mile?

A. No, sir—I was in the hotel business.

Q. Did you run a bar with it?

A. Yes, had a bar in connection.

Q. How long were you in the hotel business?

A. I think I was in the hotel business three years.

[213—191]

Q. Did you ever do any mining in Alaska before, before last summer?     A. Yes.

Q. Where?     A. Wade and Miller and Glacier.

Q. How many seasons did you put in on Wade Creek?     A. Two seasons.

Q. Were you born in the United States?

A. I was.

Q. And you are now a Canadian subject?

(Testimony of W. E. McKinney.)

A. No, sir.

Q. You never joined the Canadian government?

A. Never did.

Q. How come you to witness that power of attorney? A. At the request of Mr. Purdy.

Q. How do you know Mr. McLeod is a notary public?

A. I don't know he is—it is generally supposed he is.

Q. You don't know of your own knowledge whether he is or not?

A. I do not; I don't know you are one or any one else is for that matter—it is a supposition.

Q. You don't know whether he is a notary public or not?

A. I couldn't swear he was, but it is supposed he is.

Q. You read that power of attorney pretty carefully, did you? A. I did not.

Q. You read the acknowledgment carefully, did you? A. Not in particular.

Q. How do you know it was acknowledged at all?

A. I see the signature and seal there.

Q. That is all you saw?

A. I saw his name and saw the paper.

Q. Did you read the contents of the acknowledgment? [214—192]

A. I did.

Q. Just repeat the contents of the acknowledgment? A. Of Mr. Cole's, you mean.

Q. The acknowledgment of Mr. McLeod on that



(Testimony of W. E. McKinney.)

power of attorney—repeat the contents of that acknowledgment?

A. Well, I couldn't repeat it word for word—"I, McLeod, authorized for taking affidavits in the Yukon territory—"

Q. That was all that was on it?

A. No—knewed that so and so were present, admitted they were present and that the papers were executed in the presence of him at Forty Mile.

Q. When did you last see that paper?

A. I last saw that paper, I should think it would be—it was in July.

Q. About nine months ago?

A. The latter part of July.

Q. Last July?     A. Yes, the latter part of July.

Q. Did you read it at that time?

A. I looked over it, didn't particularly read it.

Q. Why did you look over it?

A. I looked to see if it was the power of attorney I got back after handing these papers in.

Q. Did you read it before you handed it in?

A. I looked at it to see if it was a power of attorney—that I had the power of attorney there.

Q. Can you recite any one line in that instrument?

A. It said, "I, F. W. Purdy, of Forty Mile, appoint and constitute G. L. Gates of Forty Mile my attorney-in-fact to locate mining claims in the Yukon Territory"—words to that effect, I couldn't just state it. [215—193]

Q. You are pretty sure that was part of the contents?

(Testimony of W. E. McKinney.)

A. It was a regular form of power of attorney, I suppose.

Q. What have you done since coming to Cordova to refresh your memory regarding that power of attorney? A. Why, I haven't done anything.

Q. Never talked it over with anyone?

A. I have talked it over with my attorney.

Q. Have you talked it over with Mr. Gates?

A. Some remarks, yes.

Q. And Mr. Leehey showed you a copy he has in his possession?

A. Didn't show it to me, I don't think, never noticed it.

Q. Did you read it? A. No, sir.

Q. You never saw the endorsement in Mr. Leehey's handwriting on the bottom of that copy?

A. I haven't looked at it.

Q. You never knew anything about it?

A. I heard you say there was one, here, yesterday.

Q. Didn't Mr. Leehey show you in the Windsor Hotel that copy? A. Not me.

Q. He never showed it to you? A. No, sir.

Q. And never told you the contents of it?

A. No, sir.

Q. And you didn't consult Mr. Doyle about it?

A. No.

Q. Do you want to be understood as testifying that yourself, Mr. Doyle, Mr. Gates and Mr. Leehey did not consult together regarding the contents of that power of attorney since you have been in Cordova—you and these other gentlemen didn't consult [216

(Testimony of W. E. McKinney.)

—194] and talk over that power of attorney since you have been in Cordova?

A. I said I talked with him about the power of attorney.

Q. The four of you talked over the contents of it?

A. I don't know whether the four of us did.

Q. You are testifying as to the contents of that power of attorney partially from your remembrance of reading it about nine months ago and partially from the consultation you had with the gentlemen here, are you not?

A. No, sir, I am testifying according to my memory.

Q. What is the source of knowledge from which you are testifying?

A. It is my memory of it, reading and seeing.

Q. You have a good clean memory of these things that have passed?

A. I have, on the power of attorney—that I surely had the power of attorney and had it recorded.

Q. What other instrument is there that you saw about the last of July that you can tell the contents of, any portion of the contents? What other instrument in writing is there that you can tell other than this power of attorney, nine months back? Can you state any other writing that you read about the latter part of July, 1913, and can tell the contents of it at this time?

A. Why, I read the Consular's affidavit.

Q. Independent of the power of attorney—some other and separate item?

(Testimony of W. E. McKinney.)

A. I don't understand you.

Q. Can you tell the contents of any writing other than the power of attorney that you read last July?

A. I don't know what you are referring to.

By the COURT.—The question is intended to test your memory and you are asked if you know of any other paper, either a power of [217—195] attorney, or a will, or a bill of sale, or anything that you saw about that time, that you can tell what it did contain and recollect it?

A. I could tell some of my own papers I was looking over, yes.

By the COURT.—That is what he is asking you.

A. I remember the papers of my own.

Q. Do you remember the contents of them?

A. Yes, sir.

Q. You had some powers of attorney yourself?

A. I did.

Q. How many?      A. Two.

Q. From whom?

A. One from A. P. Schultz and the other from Alexander Kingwall.

Q. And you located two claims on Big Eldorado at the same time this claim was located under power of attorney?

A. I located Number One for Mr. Kingwall and Number 3 for Schultz.

Q. When was Number Two Below Discovery on Big Eldorado located?      A. July 6th.

Q. Who was present when it was located?

A. N. P. Nelson, Tommy Doyle, myself and Gates.



(Testimony of W. E. McKinney.)

Q. Where were you on the third day of July?

A. I was on Chicken Creek and on Little Eldorado Creek, a tributary of Bonanza.

Q. Was Mr. Gates there also?

A. Mr. Gates was on Little Eldorado Creek.

Q. What were you doing on Chicken Creek the third day of July?

A. I went over with James and Nelson to look at some ground.

Q. Did you locate anything over there that day?

A. I did not.

Q. Whereabouts did you first reach Big Eldorado?

[218—196]

A. It would be somewhere near the mouth of Little Bear Creek, a tributary of Eldorado.

Q. What was the first claim located?

A. Discovery.

Q. What was the next claim above Discovery?

A. There was none located at that time.

Q. Was one located on Bear Creek or Bear Pup?

A. Yes.

Q. That was already located at that time?

A. It was.

Q. Who located that?

A. A man named Taylor.

Q. Was Taylor a member of the party?

A. That was with me?

Q. Yes.      A. No.

Q. Was Mr. Taylor on the creek at that time?

A. No.

Q. But it was located by Mr. Taylor on the 6th day of July?

(Testimony of W. E. McKinney.)

A. No, not the 6th—it was located when I was there, at that time.

Q. Was it located on the 6th of July?

A. Our claims were located on the 6th day of July.

Q. Was the first claim, the Bear Pup, located on the 6th of July besides Discovery?

A. No, I don't think so.

Q. Mr. Taylor is a partner of Mr. Doyle's?

A. Yes—I suppose so, I know of no writings or anything but traveling partners,—they came together.

Q. The first claim located was Discovery by Nelson?      A. Yes.

Q. Which end of that claim was the location notice placed on? [219—197]      A. On the upper.

Q. The next claim was a claim located by you for Mr. Kingwall, Number One Below?      A. Yes.

Q. Which end of the claim was that location on?

A. On the upper.

Q. On the upper end of that claim and the lower end of Discovery?      A. Yes, sir.

Q. On which end of the claim was the notice on Number 3 put, that you located for Schultz?

A. It was on the upper.

Q. Which end of the claim was the notice on Number 4 Below placed?

A. I wasn't down that far that day.

Q. You four men were all working together that went over there,—you were all friends?

A. We surely were, yes.

Q. Now, how many notices, written on boards, did

(Testimony of W. E. McKinney.)

you bring over from the mouth of Little Eldorado that morning.

A. We brought some of the boards over.

Q. How many did you bring over?

A. Four, I think, I don't know; I suppose they all had boards the same as myself—I had one.

Q. You had your boards?      A. Yes, sir.

Q. Any notices written on them?      A. Yes, sir.

Q. And you knew where you were going to place them before you went over there?

A. No, I didn't entirely know where I was going to place it; I had the whole creek to place it on at that time, could place [220—198] them anywheres I wanted to.

Q. And you took all the available ground on the creek at that time?

A. No, there wasn't a claim staked from Discovery up I know of—Discovery was open, all above Discovery; there was no lower Discovery staked at that time.

Q. Not down at the mouth?

A. It belongs to Hamshaw now.

Q. That wasn't staked at that time?

A. No.

Q. How did you proceed to stake Number One Below Discovery?

A. As I stated before I used the corner stakes, the upper corner stakes and the lower corner stakes of Mr. Nelson, the upper for Number One and his lower corner stakes for the upper end of Number 3.

Q. What was the first act you did towards locat-

(Testimony of W. E. McKinney.)

ing Number I Below Discovery?

A. The first act was to build a monument between Discovery, on the lower end of Discovery, and the upper end of One.

Q. Did you put up any corner stakes on that end, the upper end of Number One?

A. I don't remember whether I put them up or Nelson.

Q. Then you went down to the lower end of One?

A. Yes.

Q. And put a monument there? A. Yes.

Q. What did you do about staking the lower end of the claim, No. 1? A. I joined to Gates.

Q. What did you do at that time, what was the next step you did after erecting a monument?  
[221—199]

A. To write my notice on the stakes.

Q. You went out and wrote your notice on the stakes?

A. Describing the corners, the limit.

Q. At which stake did you put the lower end first?

A. I don't know which limit I went to first.

Q. Gates had those stakes already up?

A. He had his claim staked up, yes—his set up.

Q. He staked his claim before you staked yours?

A. Yes, I was getting stakes and building monuments.

Q. Where were you getting stakes?

A. Along the creek, the same as any three or four men would be at, they were all helping at one thing and another to stake—they were all helping one another to stake.



(Testimony of W. E. McKinney.)

Q. You want to be understood that Mr. Gates put up those stakes and wrote his markings on them and then you went out and wrote your markings on them?

A. Yes, on the upper end, that is for Number One.

Q. The upper end of Number 2 and the lower end of Number 1—Gates didn't make any of your markings on them? A. No.

Q. And you didn't make any of his markings?

A. No.

Q. In other words you didn't erect the corner post on the right limit and Gates the corner post on the left limit? A. No.

Q. Each man went out and made his own markings? A. Yes.

Q. What did you write upon your post on the right limit?

A. Left limit, Big Eldorado Creek, lower corner.

Q. Is that all— You referred to it as Big Eldorado? [222—200] A. Yes, sir.

Q. Your notice of location had been recorded as Eldorado, why did you put Big?

A. We called it Big Eldorado at that time.

Q. Your notice of location, however, was an error and the other was Little Eldorado?

A. They were commonly known as that.

Q. Who erected the monument that contained your notice of location at the upper end of Number Three? A. Why I helped erect part of it.

Q. And who helped on the rest?

A. I think Gates, Nelson—some of them.

(Testimony of W. E. McKinney.)

Q. You helped to erect part of that monument?

A. Yes, sir.

Q. Then if Gates stated that while you were erecting a monument at the lower end of Number One, he went down and erected a monument at the lower end of Number Two, he is mistaken.

A. I am not sure, I am not positive,—we were working as I say together; I am not so positive as to this.

Q. Now, of all those monuments that were erected there that day by you four men, the only one that contained two notices was the one at the lower end of Number Two and the upper end of Number Three? A. All I know of.

Q. And you are positive that the monument at the lower end of Number One and the upper end of Number Two did not have a notice of location on it?

A. It had a stake stuck into the monument.

Q. You will swear positively the board was not there? A. Yes, sir. [223—201]

Q. What impressed you to that extent?

A. Well, Gates was writing a notice and placing it on the monument below.

Q. The notice was written over on Bonanza, was it not? A. No.

Q. Gates' board had no writing on it.

A. There was writing on it—he might have written part of it out on Bonanza or Eldorado.

Q. Who wrote your notice over at Eldorado before you came over? A. No one.

Q. Your notices were bare boards when you went over there?

(Testimony of W. E. McKinney.)

A. No, they had some writing on them.

Q. Who wrote them?

A. I think it was Taylor.

Q. Taylor wrote all the notices, did he?

A. No.

Q. Do you know who wrote Gates' over at Eldorado?     A. I do not; I think Taylor.

Q. Do you know of Mr. Doyle locating Number 4 that day?     A. I do.

Q. And you are positive Doyle located Number 4 on the 6th day of July?

A. Yes, as near as our calendar might be correct, or our way of keeping dates; I couldn't be so positive, I had no almanac or nothing there.

Q. You were not so long in the country that you would lose track of the dates?

A. A person can't be very correct being sixty or thirty days out—I didn't know when Sunday or Monday came.

Q. Do you know whether it was Sunday or not you made the location?     A. I do not. [224—202]

Q. You are positive that your notices that were posted on the ground said the 6th day of July?

A. Yes, sir.

Q. And if Mr. Doyle's location notice as recorded says it was located on the third, it is an error, is it?

A. I think so.

Q. Who prepared the notice of location you had recorded for Number 2?

A. I think Mr. James—it was kinder complicated; I asked him to fix it out for me; it was an old notice for quartz.

(Testimony of W. E. McKinney.)

Q. What claim is that?

A. That was for Big Eldorado, Number 1 Below.

Q. Now, when you went over there to make these locations, you took some notices over to locate some claims above Discovery, did you not? A. No.

Q. Didn't you intend to locate above Discovery as well as below Discovery when you went over there?

A. No, unless it suited us—the looks of the ground.

Q. You took over some extra boards—you didn't use all you had? A. No, sir.

Q. You used all the boards you had?

A. Yes, sir.

Q. It was agreed before you went there that you were to have two claims, Gates one, Doyle one and Nelson one, was it? A. No, sir.

Q. It was not? A. No, sir.

Q. How did you just happen to have the exact number of boards you required?

A. Probably we didn't need any more. [225—203]

Q. How did you arrive at the fact that you would have two claims and the other gentlemen one?

A. We didn't arrive at that fact at all.

Q. You used just the exact number of boards you had with you?

A. I don't know whether we used the exact number; I used two—two is all I had.

Q. That is all you took over there?

A. Yes, sir.

Q. And the other gentlemen, you don't know



(Testimony of W. E. McKinney.)

whether they used all or not?

A. I intended to stake for the two powers of attorney I had and consequently I didn't need any more boards.

Q. All the claims staked there except Nelson's were staked by powers of attorney that day?

A. I am not sure.

Q. You know Doyle staked for Markley by power of attorney?

Mr. LEEHEY.—We object to that, the record is the best evidence.

Objection overruled—defendant excepts.

A. I have heard so.

Q. When did you next return to that property?

A. The latter days of August, I think.

Q. Was it after Sutherland had located his Surprise Fraction?

A. I suppose it was Sutherland.

Q. You saw his notice, didn't you?

A. I didn't go up to look at it; I was told by the other gentleman, his partner Ford.

Q. That was the first time?

A. That was the first time I knew they were claiming it.

Q. You don't know what date that was?

A. Well, it was the latter days of August or the first of September, [226—204] somewheres along there, I am not positive.

Q. Did you know at that time he had posted his notice of location?

A. I did not; I never read his location notice.

(Testimony of W. E. McKinney.)

Q. Never read it, even after that?

A. No, sir.

Q. When did you first discover Purdy's location notice at the upper end of the claim?

A. On my first arrival over there, when Ford was there.

Q. What business had you removing that notice to the lower end—you were not interested in the claim?

A. I was sent over there to do the representation work for Gates.

Q. Have you any interest in that claim?

A. No, sir.

Q. Never did have?      A. No.

Q. When did you commence doing that representation work for Gates?

A. I say the latter days of August or the beginning of September.

Q. How much work did you do, how many days?

A. Eight days' work.

Q. Yourself?

A. Eight and a half days for one man.

Q. Who did the work?

A. Me and Mr. Kingwall and Schultz.

Q. Schultz did some work on Number Two?

A. Yes, sir.

Q. And Kingwall did some work on Number Two?      A. Yes.

Q. And yourself?      A. Yes, sir.

Q. You did no work there, however, until after Sutherland had located— [227—205] You did no

(Testimony of W. E. McKinney.)

work upon Number 2 until after Sutherland had located?

A. Nothing more than to locate and prospect it.

Q. How much prospecting did you do?

A. Did some panning.

Q. The first day?

A. That was when we first staked it, on the first day; I went to working Two; I panned the first day I came over there to work Two, in Kingwall's cut, where he was running above Ford; I brought a pan over and panned that day.

Q. Now, the first time you were over there, the day you located, you only spent two hours over there, your whole party, you have testified; you said your party was there only two hours that day?

A. I don't remember testifying to that—I never testified to two hours at no time; I never made any such statement, I don't think.

Q. Who was on the ground the first time you went over there?      A. Ford.

Q. Was he working on the ground that time?

A. Yes.

Q. Did he have a cut started?

A. He had a little drain there in the creek, yes, sir.

Q. Who was with you that day?

A. No one at that time.

Q. Did you do any work on the claim that day?

A. I did.

Q. How much work, how many hours?

A. I should judge about 4½ hours or five hours.

Q. Where did you work?

(Testimony of W. E. McKinney.)

A. I worked on the lower end.

Q. When did you next return to the property?

[228—206] A. I returned the next day.

Q. Who was with you that day?

A. Kingwall and Schultz.

Q. What day was that Schultz was with you, the second day? A. Yes, sir.

Q. He did some work? A. Yes.

Q. On this property?

A. On the one below, on Number Three.

Q. Who did the work on Number Two?

A. I did and Kingwall and Schultz and Mr. Atkinson—myself, Schultz, Miles Atkinson and Kingwall.

Q. You said Schultz was working there?

A. He represented Three, he worked that day on Three.

Q. Who worked the second day you went over there on Two? A. Me and Kingwall.

Q. How long did you work?

A. About five hours.

Q. When did you return to the property next?

A. I think the third of September, whatever the dates were, I worked on it continuously until that time, did the representation work.

Q. I want to know the hours you worked on that claim.

MR. LEEHEY.—We object to any further cross-examination concerning the annual representation work, it is not involved in this action in any manner and is improper cross-examination. The defendant had all of the calendar year of 1913 in which to per-



(Testimony of W. E. McKinney.)

form the annual labor, and it would not be subject to relocation until the first day of January, 1914.

By the COURT.—The objection will be sustained at this time on the [229—207] ground that it is not proper cross-examination.

Mr. DONOHOE.—Because it is the understanding that there is no testimony before the Court that the assessment work has been done?

By the COURT.—Yes.

Mr. DONOHOE.—That's all.

(By Mr. LEEHEY.)

Q. In your cross-examination in stating the contents of that power of attorney from Purdy to Gates I believe you made the statement that it authorized Gates to locate mining claims in the Yukon Territory—is that correct?     A. In Alaska.

(By Mr. DONOHOE.)

Q. Do you remember recording the notice of location for this claim Number Two?     A. I do.

Q. Do you remember that that notice of location said, starting at the initial monument and running 1320 feet down the stream?     A. No, sir.

Q. You don't remember that?     A. No, sir.

Witness excused. [230—208]

**[Testimony of Robert W. Wiley, for Defendant.]**

ROBERT W. WILEY, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. LEEHEY.

Q. What is your name?

A. Robert W. Wiley.

Q. Are you familiar with the White River record-

(Testimony of Robert W. Wiley.)

ing district, Alaska? A. Yes, sir.

Q. How long have you been familiar with that country? A. Since 1902.

Q. You have property there? A. I have.

Q. State whether you have been in the country much of the time since then.

A. I have been in there every season, every summer.

Q. Are you familiar with the topography of the country? A. I am.

Q. Have you been in the so-called Shushana diggings? A. Yes, sir.

Q. When were you first in that country?

A. I was first in Shushana country in 1903.

Q. Were you there during last summer?

A. Yes, the greater part of the summer.

Q. Are you familiar with the circumstances attending the entry of an order by this Court on May 7, 1913, creating the White River precinct and recording district? A. Yes, sir.

Q. Where were you on that occasion?

A. Here in Cordova.

Q. At whose request was the order issued?

A. Mine. [231—209]

Q. Do you know the place designated as Wiley, Alaska? A. I do.

Q. Where is that metropolis?

A. That place is located at the mouth of Solo Creek.

Q. How large a place is it?

A. There are probably several cabins there now.

(Testimony of Robert W. Wiley.)

Q. How many people live there?

A. I suppose now there must be three or four.

Q. Was a recording office ever established there?

A. No.

Q. Do you know H. E. Morgan who was appointed recorder?     A. Very well.

Q. Do you know when he first arrived in the White River recording district?

A. In the summer of 1913.

Q. After May 7, 1913?

A. About the second day of September.

Q. That was at Wiley?     A. Yes.

Q. When did he first arrive in the district?

A. He arrived on the 20th day of July.

Q. How do you know that?

A. We left the canyon on the 16th and were four days going over.

Q. You accompanied him?

A. Yes, I was with him at the time.

Q. The canyon was where?

A. Canyon City, that is in the Yukon Territory—that is on the trail coming in.

Mr. LEEHEY.—That's all. [232—210]

Cross-examination by Mr. DONOHUE.

Q. You say there was no recording district ever established at Wiley?

A. The order was issued for Wiley but there never has been any recording district there.

Q. Didn't Mr. Hamshaw act as recorder there?

A. That was over at the Island, six or seven miles away, North Fork Island.

(Testimony of Robert W. Wiley.)

Q. How far is that from the Shushana district?

A. About forty-five or fifty miles.

Q. How far is Wiley from the Shushana district?

A. About 35 miles; it would be about 42 miles to the Island and Wiley is about 35 miles.

Q. What part do you count from in this Shushana region?

A. You asked me how far Wiley was from the Shushana district—it is 35 miles.

Q. From the present town of Chisana?

A. Yes, sir.

Q. Or are you basing it from the mouth of Little Eldorado Creek?     A. No.

Q. You can make it in a day's travel?

A. Yes, a long day.

Q. Do you know of a miner's meeting electing Mrs. Hamshaw recorder there?

A. Yes, that was held at the North Fork Island.

Q. When?

A. About the tenth of July, about that, 9th or 10th.

Q. Don't you know of her accepting and recording notices? Do you know of records being filed as early as the 23d day of June with Mrs. Hamshaw?

A. No. [233—211]

Q. Did you ever see the books she kept?

A. No, I don't believe I have.

Q. Is that her handwriting? (Handing witness paper.)     A. What is this?

Q. I don't know— What does it purport to be?

A. A record of Mrs. Hamshaw's 23d day of June—that is Mullan townsite.



(Testimony of Robert W. Wiley.)

Q. That is her writing?

A. I don't know whose writing it is; I am not familiar with it—that don't amount to anything.

Q. When was this miner's meeting held?

A. The tenth day of July.

Q. You attended it?

A. Seven or eight men there.

Q. The record of that meeting shows here?

A. It ought to if that is the book.

Q. You know all about that book but don't know anything about the previous record of Mrs. Hamshaw?

A. I didn't know she ever had any.

Q. You are familiar with this book?

A. I am not, I don't know the book at all.

Q. You spoke rather sneeringly of the place called Wiley—you were instrumental in having that order made, fixing that place for recording?

A. Yes, I was.

Q. And at your request Judge Overfield fixed the headquarters at Wiley, near the mouth of Solo Creek?

A. Yes, that was to be his headquarters.

Q. You simply imposed on the Judge?

A. We didn't impose on the Judge; it was a matter of convenience to us there; we didn't want to send our papers to Forty Mile [234—212] to have them recorded; it was a matter of convenience.

(By Mr. LEEHEY.)

Q. You say you didn't want to send the papers to Forty Mile—had you been in the habit of doing so?

(Testimony of Robert W. Wiley.)

A. We always did so; all our papers went to Forty Mile and I didn't know any different until Judge Overfield advised me of the fact that that wasn't the place to send the papers.

Q. When did he do that?

A. Last spring, 7th day of May—I never knew any different.

Witness excused.

**[Testimony of Thomas Doyle, for Defendant.]**

THOMAS DOYLE, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. LEEHEY.

Q. What is your name?     A. Thomas Doyle.

Q. What is your occupation?

A. I have been mining and prospecting.

Q. How long have you followed that occupation?

A. Since 1898 regularly.

Q. Do you know what is commonly designated as the Shushana region in Alaska?     A. I do.

Q. Have you ever been there?     A. I have.

Q. When did you first reach that place?

A. The 26th day of June.

Q. Do you know a creek in there designated as Eldorado or Big Eldorado Creek?     **[235—213]**

A. I do.

Q. Did you ever visit that creek?     A. I did.

Q. When?     A. On the 6th of July.

Q. In whose company?

A. McKinney and Gates and Nelson.

Q. Where were you living or camping or established at that time?

(Testimony of Thomas Doyle.)

A. At the mouth of Little Eldoraro, a tributary of Bonanza.

Q. State the circumstances, describe how you went over there and what you did?

A. We left Dawson, coming from Coffee Creek, a place on the Yukon, about 135 miles from Dawson and went by horses across country; we struck the White River at a point about 130 miles from the mouth, a place called San Pete, where we left Nelson, Schultz and Gates and from there we proceeded overland to Shushana.

Q. On this particular sixth day of July, describe your trip from your camp to Eldorado Creek—what day was it that you first went to Big Eldorado Creek?

A. The 6th of July.

Q. Describe your trip that day.

A. We left there in the morning some time and we staked Eldorado Creek; looked the creek over a little first, before Nelson located Discovery.

Q. Did you do any prospecting on that creek?

A. We did.

Q. Describe to the jury what was done?

A. We just had a pan and took a shovel and would naturally go around where you think it was the most likely looking place.

Q. Did you obtain prospects?

A. Yes. [236—214]

Q. Were they encouraging?      A. Yes, sir.

Q. State whether the prospects were such as to indicate that the creek beds, the ground there adjacent to it, were worthy of further exploration and de-

(Testimony of Thomas Doyle.)

velopment?     A. I think surely they were.

Q. Were any mining claims located there by your party that day?

A. Yes, we all located that day.

Q. Did you locate a claim?

A. I did, by power of attorney.

Q. What claim?     A. Number 4 Below.

Q. Is that claim involved in litigation?

A. Yes, sir.

Q. The cause now pending in this court?

A. Yes, I believe it is.

Q. Are you familiar with a claim on that creek designated as Number Two Below Discovery?

A. Yes, I was there at the time it was staked.

Q. Who staked it?     A. Gates.

Q. Do you know how he located it, whether for himself or a principal?

A. By power of attorney—I think he told me that.

Q. Did you see his location notice?     A. I did.

Q. Did you see his location monuments?

A. Yes, sir.

Q. State to the jury where this location notice was placed with reference to the location monuments and with reference to the different ends of the claim.

[237—215]

A. Gates put his notice on the lower center post.

Q. On what was that notice written?

A. On a piece of board.

Q. How was the notice placed there?

A. It was just on a rock and another rock on top of it.



(Testimony of Thomas Doyle.)

Q. On the flat ground?     A. No, on a monument.

Q. What was the monument?

A. Built of rock 2½ or 3 feet high.

Q. Did you assist in the work of staking the claim?

A. I did.

Q. State whether you saw any corners established.

A. Yes.

Q. Describe the corners.

A. A willow post, about 2½ or 3 feet.

Q. Where were these willow posts obtained?

A. Right in the creek; we probably had to go a quarter or half a mile—wherever we could get willows.

Q. Were they green or dry?     A. Green.

Q. Did you assist in preparing any of these corners?     A. I did.

Q. State how the stakes were prepared.

A. We had to go and cut the stakes and got them prepared and put them up.

Q. How did you prepare the stakes?     What length did you cut them?

A. Three feet about, I should judge.

Q. About how thick were they?

A. I don't know; I don't suppose over two inches or 2½, probably.

Q. Were they peeled or hewn or what?

A. They were hewn off at the ends where we wrote on them. [238—216]

Q. Were they marked when they were set in the ground?     A. Yes.

Q. How?

(Testimony of Thomas Doyle.)

A. Each claim, the upper corner stakes, etc.—upper and lower corner stakes.

Q. What method or instrument was used for marking?

A. Lead pencil.

Q. On the bark?

A. No, we kinder hewed them off at the top.

Q. Did you observe whether the various corners on #2 Below were all set?      A. Yes, sir.

Q. State whether you examined each corner.

A. No, I did not.

Q. Did you see each corner set?

A. I saw the stakes there but didn't examine them, didn't go up to them.

Q. Did you see any marks on any of the corners?

A. The corners were marked I know on the left limit—I looked at them.

Q. How were they marked?

A. I am not sure which limit; anyhow, it read Lower left corner stake of Big Eldorado No. 2,—Something to that effect; I couldn't remember exactly.

Q. You didn't go to each corner?      A. No.

Q. And didn't read the markings on each corner?

A. No.

Q. All this occurred when?

A. The 6th of July.

Q. Who did the various acts of location on this claim No. 2 Below [239—217] Discovery?

A. Mr. Gates.

Q. Did you know anything about the preparation

(Testimony of Thomas Doyle.)

of his location notice on this board—did you see him write it?

A. I didn't take notice; I know it was written on it that day, but I never took any particular notice of the location notice.

Q. Did you see him place it in position?

A. Yes, I saw him putting on the lower monument, center monument.

Mr. LEEHEY.—That is all.

Cross-examination by Mr. RITCHIE.

Q. In staking these claims, did all four of you travel together all the time?

A. We did, various places.

Q. You staked four claims together, the four men?

A. Yes, sir.

Q. Were each of you present at the time all the corners posts were set on all of them.      A. Yes, sir.

Q. You traveled together all day?      A. Yes, sir.

Q. What time did you get there that day?

A. Darned if I know—some time early in the morning.

Q. How far did you have to walk from your camp?

A. I don't think the way we went over three miles.

Q. What time in the day did you finish the staking?      A. We got back some time that evening.

Q. You were there from along early in the forenoon until past the middle of the afternoon?

A. Yes, it was evening when we got back.

Q. And at that time the four of you had staked four claims, each a [240-218] quarter of a mile long?      A. Yes.

(Testimony of Thomas Doyle.)

Q. And you worked together nearly the whole day?     A. Yes.

Q. You saw each man stake his claim and the other three men were with you when you staked your claim?     A. Yes, sir.

Q. You are sure it was the 6th of July?

A. Yes—as near as I can figure it was the 6th of July.

Q. Did you carry any calendar with you?

A. No.

Q. How do you fix the date—as men will keeping tab from day to day?     A. Yes.

Q. What day of the week was it?

A. I couldn't say.

Q. Where were you on the Fourth of July?

A. I must have been around the mouth of Little Eldorado; we were camping there.

Q. Were you staking claims between the 2d and 6th of July on some other creek?

A. I think we staked on the second.

Q. Where were you on the third?

A. I think we went over to Chicken—I know we did, with James.

Q. Any of those other men with you?

A. James and I think Nelson was along.

Q. You staked a claim on this 6th of July as attorney for Asa Markly?     A. Yes, sir.

Q. Did you file that notice for record?

A. I did.

Mr. LEEHEY.—We object to that—the testimony of the witness shows [241–219] that particular



(Testimony of Thomas Doyle.)

claim is involved in litigation in this court. Objection sustained as incompetent. Plaintiff excepts.

Q. Do you know how the date of your alleged location on the 6th of July reads, as to the date of recording?

Mr. LEEHEY.—We make the same objection, as incompetent, irrelevant and immaterial and improper cross-examination.

Objection sustained. Plaintiff allowed an exception.

Q. How much of the time were you with Gates while he was traveling around this claim setting stakes?

A. I couldn't say just the time.

Q. Were you with him when he set each of the corner posts? A. Not all; no.

Q. Which one, do you remember?

A. I think it was the left limit.

Q. Were you with him at the time he and Mr. McKinney testified that the monument was set between one and two? Were you present at that time?

A. When they were setting the monument?

Q. Yes.

A. I was on the creek and saw them working.

Q. Were you working with them?

A. I might help them a little while.

Q. You didn't take any notice what they put there? A. No.

Q. Did you go with Gates when he walked down the claim and paced it off to set the stake at the lower end?

(Testimony of Thomas Doyle.)

A. No, I was down at the lower end, coming up, I think.

Q. Were you with him when he built the monument there?     A. I saw him building it.

Q. Did you assist in building it?

A. Not very much; I might have put a rock or two on it. [242-220]

Q. Did you see the notice he wrote?

A. I didn't read it very carefully.

Q. Did you see it?     A. Yes.

Q. Did he write it there, in your presence?

A. No.

Q. Was it written before he came over there?

A. I couldn't say.

Q. All of you brought some boards over there that had been written out, or partly so, before you left your camp in the morning?

A. I don't know—mine was. I know I had my own.

Q. Partly written?     A. Yes, sir.

Q. Do you know whether the location notice of Mr. Gates for Mr. Purdy was partly written or not?

A. I couldn't say.

Q. Did you see him writing?     A. I did.

Q. Were you standing where you could see just what he wrote?     A. No, I might have—if I paid particular attention to it I might but I never looked or observed it.

Q. Did you read it over after he had written?

A. I saw the signature.

Q. You didn't read the statements in it?

(Testimony of Thomas Doyle.)

A. No.

Q. You don't know at which point he undertook to launch the claim?     A. No.

Q. What was the monument?

A. A rock monument  $2\frac{1}{2}$  feet high, probably.

Q. Was it built of small rocks or large ones?  
[243-221]

A. Some of them were fairly good-sized rocks more than small or average run of rocks.

Q. Are there many large boulders on the creek?

A. Quite a few. They were pretty fair-sized boulders, some would probably weigh 100 pounds.

Q. As a matter of fact, were there more than three boulders in that monument?     A. Yes.

Q. Was there as many as six?

A. I would think so.

Q. How high was the top of the monument?

A. I should judge  $2\frac{1}{2}$  or 3 feet.

Q. And the board was on top of the monument and held down with a flat rock?     A. Yes, sir.

Q. Did you ever see it afterwards?     A. No.

Q. Did you ever see the notice afterwards?

A. No.

Q. Were you ever on the creek after that day?

A. Not until late in September.

Q. Who else was there at the time this monument was built and the notice placed there?

A. I think McKinney was near by.

Q. Anyone else?

A. No—I don't remember whether Nelson was or not right there.

(Testimony of Thomas Doyle.)

Q. Where did you get the stakes you cut up for corner stakes?     A. We got them on the Creek.

Q. Cut them on the ground?

A. No, we had to go below a little ways.

Q. There are no willows on the claims? [244-222]

A. No, not right there, not big enough for a stake—there might be some little low bushes.

Q. How extensive is the growth of willow there—just a fringe along the creek?     A. Yes, sir.

Q. How large are the largest willows growing on any of these claims?

A. I don't think over 3½ inches thick,—probably, not that much.

Q. You cut these willows some distance below and carried them up?     A. Yes.

Q. When did you do that?

Q. We had to go down below to cut them.

Q. I thought you said the willows were as large as 3½ inches on the creek?     A. That is below.

Q. I meant, how large the willows were that grew on these claims?

A. There are no willows at all on some of them, on Discovery, I don't think there is any, or One and Two Below.

Q. You would have to go some distance below?

A. Yes.

Q. How did you blaze the willows for marking?

A. We blazed off two sides.

Q. With a knife?     A. Yes, a pocket-knife.

Q. Peeled the bark off?

A. Peeled the bark off and a little of the wood.



(Testimony of Thomas Doyle.)

Q. So as to flatten the blaze?     A. Yes.

Q. You whittled them on two sides?

A. Yes, sir.

Q. Did you use any of those stakes for more than one claim?     A. No, I did not. [245—223]

Q. Do you know whether any of the others did?

A. The way we staked, we used one stake for two claims—yes, that is the way we staked.

Q. You only saw the corner stake on the left limit?

A. I think it was the left limit, it was the only one corner stake; I didn't go up close to that,—I saw them all but didn't go close to them, wasn't close to them.

Q. Did you notice the description on them, on that?

A. Yes, I think it was Number one, corner post, left limit, Big Eldorado, something to that effect.

Q. Did you afterwards see any of those other stakes of that claim?

A. After the 6th of July?

Q. Yes.     A. No.

Q. You have never visited the creek since then?

A. I visited the creek but didn't pay any particular attention to that claim.

Q. You didn't go on the claim?

A. I walked by it.

Q. Who were in your party that day?

A. McKinney, Gates, Nelson and myself.

Q. You staked just four claims?     A. Yes.

Q. Where did you get the hunch to go on Big Eldorado that particular day?

(Testimony of Thomas Doyle.)

A. We were traveling all over the country.

Q. When you started out that morning it was with the specific intention of going to Big Eldorado and locating at least a claim a piece? A. Yes, sir.

Q. That is what you took those boards for, with the markings [246-224] partly written on them?

A. Yes.

Q. Had you any information about Big Eldorado before that time?

A. We were told about it by James; he had been over there and told us the creek looked pretty good.

Q. You had never been over there before that day?

A. No,

Q. How much time did you spend on the creek before you began to stake claims?

A. We were over there probably three or four hours.

Q. You didn't begin to stake until afternoon?

A. No.

Q. Did you go up and down the creek several times?

A. We went up and down—I don't know about several times.

Q. There is no possibility of your being mistaken about the day?

A. I don't think so; absolutely none.

Q. It could not have been the 7th or the 5th?

A. I don't think so.

Q. Did you notice where the discovery notice or monument was placed on each one of these four claims? A. Yes, they were all in the creek bed.

(Testimony of Thomas Doyle.)

Q. The initial monument?

A. The initial monument.

Q. Where was it on Discovery?

A. It was pretty well to the right limit, I think, of the creek bed.

Q. You understand I am referring to the notice of location—where was the notice of location posted on Discovery claim?     A. Pretty well to the left limit.

Q. On which end?     A. On the upper end.  
[247—225]

Q. Right on the boundary, on the end line?

A. Yes, sir.

Q. And where was the notice posted on Number One Below?

A. It was on the lower center post of Discovery.

Q. That is beyond the lower end of Discovery?

A. Yes, sir.

Q. Or the upper end of Number One?

A. Yes, sir.

Q. Do you remember how that notice read?

A. No.

Q. Do you know which way it made the claim strike,—up or down?

A. No, I didn't read the notice myself.

Q. The notice of location of Number Two, then, was two claim lengths from that?

A. Yes, it was put on the lower stake, the lower monument.

Q. The Discovery was placed on the upper end, No. 1 was placed on the upper end and No. 2 was placed on the lower—two claim lengths away?

A. Yes, sir.

(Testimony of Thomas Doyle.)

Q. Where was the location Notice of Three posted?     A. On the same monument.

Q. Where was 4 posted?

Mr. LEEHEY.—We object to any testimony concerning No. 4.

Objection sustained. Plaintiff allowed an exception.

Q. Describe how those two notices were placed on that claim between Two and Three.

A. They were both put under rocks.

Q. Right together?

A. No, I don't think they were right together.

Q. They were on the same monument?

A. They were on the same monument. [248-226]

Q. How high was that monument?

A. About, I judge, three feet, 2½ or 3.

Q. Built of large boulders or small boulders?

A. Fairly good-sized rocks.

Q. Were both of those notices written on boards?

A. Yes.

Q. All your notices that day were written on those small boards taken from a milk case or something of the kind.

A. Yes, sir.

Q. You say those two boards were not right together?     A. No.

Q. Was one placed higher than the other?

A. Yes, one was placed below the other, I think.

Q. Is it not a fact that you prepared the notices to locate One and Two before you came over, 1 and 2 Above Discovery before you came over there?



(Testimony of Thomas Doyle.)

A. No, sir.

Q. Did you locate anything above Discovery that day?     A. No, sir.

Q. Just those four claims?     A. That is all.

Q. Five claims—Discovery and four Below?

A. Yes.

Q. Which of the notices were prepared or partially prepared before you left camp?

A. I had mine partly written, that is, it was filled out—all I had to do was to put in the date and the number of the claim.

Q. You didn't have the number filled out?

A. No.

Q. You didn't know what number it would be?

[249-227]     A. No.

Q. Do you know how far Number Three was filled out?     A. No.

Q. That was the one which McKinney located for Schultz—you don't know how far he had his notice written out?     A. No.

Q. Do you know to what extent Gates had the notice for Purdy written out on Number Two?

A. No.

Q. How about Number One?

A. I don't know about any of them.

Q. Did you know before you went over there which of you was going to locate any particular claim?     A. No.

Q. How did you arrive at the division of the ground when you got there?

A. Some of the claims we staked we drew straws

(Testimony of Thomas Doyle.)

for and some we had to suggest among ourselves which one.

Q. Just by agreement?

A. Just by agreement.

Q. Were all those green willows that you cut?

A. Yes, all green willows.

Q. With leaves on them??      A. Yes, sir.

Mr. RITCHIE.—That's all.

Witness excused. [250—228]

**[Testimony of Nels P. Nelson for Defendant.]**

NELS P. NELSON, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. LEEHEY.

Q. What is your name?      A. Nels P. Nelson.

Q. What is your business?      A. Miner.

Q. How long have you been in Alaska and the Yukon Territory?      A. Sixteen years.

Q. Have you ever been in the Shushana diggings?

A. Yes, sir.

Q. When did you first go there??

A. I went there in March, 1913.

Q. Do you know the G. L. Gates, who has testified in this action?      A. Yes, sir.

Q. Are you familiar with the creek in the Shushana region known as Big Eldorado Creek?

A. Yes.

Q. Do you know the location of the important claims on that creek?      A. Yes, sir.

Q. I believe you staked Discovery claim on that creek?      A. Yes, sir.

(Testimony of Nels P. Nelson.)

Q. When did you do so?

A. On the 6th of July, 1913.

Q. In whose presence?

A. McKinney and Gates and Doyle and myself.

Q. Do you know the location of the claim designated as Number Two Below Discovery on Eldorado Creek?     A. Yes, sir.

Q. Do you know when that was staked?

A. Yes. [251—229]

Q. When?

A. It was staked the same date, the 6th of July.

Q. By whom?     A. Gates.

Q. Did you observe the location of the monuments on that?     A. Yes, helped build them.

Q. What do you know with reference to the stakes or monuments marking the corner of that claim?

A. I saw the corners there; I didn't go up to them.

Q. How were they marked?

A. I don't know; I saw the corners were up there; there was willow stakes standing up there.

Q. What did the monument consist of?

A. The monument consisted of rocks and the corner stakes were willow stakes.

Q. Did you observe any location notice posted on the claim designated as Number Two Below Discovery?     A. I did.

Q. Did you see it posted?     A. Yes, sir.

Q. By whom?     A. Gates.

Q. On what date?     A. The 6th of July.

Q. At what place on the claim was this location notice posted?

(Testimony of Nels P. Nelson.)

A. It was posted on the lower center end stake.

Mr. LEEHEY.—That's all.

Cross-examination by Mr. RITCHIE.

Q. You were there when that was posted?

A. Yes, sir. [252—230]

Q. Who else was there?

A. McKinney and Doyle and Gates.

Q. All of you were there?

A. We were on the creek, yes.

Q. Were you standing right by when the notice was put there?

A. No, I was helping him build the monuments, but was there when he put it there.

Q. Were you there just at the time the notice was put on the monument? A. Yes.

Q. Did you see Gates write it?

A. I did. I saw him write part of it.

Q. He brought it with him partly written?

A. I couldn't testify as to that—I saw him write there.

Q. Did you read it after he wrote it? A. No.

Q. You don't know what was in it, then?

A. No, I do not.

Q. You simply know he wrote something you assumed to be a notice and placed it on the monument?

A. Yes, sir.

Q. That was at the lower center end stake?

A. That was at the lower center end stake.

Q. Of Number Two? A. Yes.

Q. Do you know where the notice on Three was?

A. It was on the same monument.



(Testimony of Nels P. Nelson.)

Q. On a different board?      A. Yes.

Q. The two were put in right together?      [253—  
231]

A. Yes, they were both on the same monument.

Q. Where was the location notice placed on your discovery?      A. On the upper center end stake.

Q. And were you present when the notice was posted on #1 Below?

A. I think I was around there; I don't know that I was right there when they posted it; after I staked my claim I took a pan and went panning.

Q. Did you see the notice on Number One after it was posted?      A. No, I did not.

Q. Do you know which end of #1 it was posted on?

A. Yes, I think it was posted up on the lower end of my claim.

Q. It was on a line between Discovery and One Below?      A. Yes.

Q. On the upper end of One?      A. Yes.

Q. Just a claim length below your notice?

A. Yes.

Q. And Number Two was posted two claim lengths below that?      A. Yes, at the lower end of One.

Q. Two and Three were on the same monument, together?      A. Yes.

Q. Do you know where #4 was posted?

A. It was posted on the lower end of #4.

Q. How do you know?

A. I saw it there; I was there when they posted it.

Q. It was two claim lengths away from #2, then,

(Testimony of Nels P. Nelson.)

the notice of Two?     A. Yes.

Q. There was no notice then placed on the boundary between 3 and 4?     A. I don't think so.

Q. How far down the creek does Number 3 go—does it go to the canyon?     [254—232]

A. No, quite a ways above.

Q. Does Number 4 reach the canyon?     A. No.

Q. You are sure Four does not extend into the canyon?     A. Yes, sir.

Q. How far is it from the upper end of the canyon?

Mr. LEEHEY.—We object to that as immaterial.

Objection sustained; plaintiff allowed an exception.

Q. Did you see any of the stakes on Number Two?

A. I saw all of them.

Q. Were you present when they were set?

A. I was right there on the ground; yes.

Q. You went around with Gates as he set each one of them?

A. No, you can see all the stakes from the creek bottom.

Q. You didn't go up to where they were set, then?

A. No.

Q. Did you see any of them at close range after they were set?     A. I saw all of them, yes.

Q. Did you go up close to them or see them from where you stood?

A. I see them from the creek bottom; I saw them setting them.

Q. Where were you working after you staked your

(Testimony of Nels P. Nelson.)

own claim—you say you were panning in the creek?

A. Yes.

Q. Whereabouts? A. Right on Discovery.

Q. And Mr. Gates was working from a quarter to a half mile away on Number Two?

A. No, McKinney was staking these claims.

Q. Wasn't Gates staking Number Two?

A. No, not right then; he was pacing it off, I guess—he hadn't put up any stakes yet. [255—233]

Q. I think you said you saw Gates when he was there setting the corners, the corner stakes on Number Two? A. Yes, sir.

Q. You were panning at the time? A. Yes, sir.

Q. You were then about half a mile from him?

A. No, I was on the lower end of Discovery.

Q. It is 1,320 feet to the upper end of Two?

A. Yes.

Q. That is a quarter of a mile? A. Yes.

Q. And another quarter of a mile to the lower end of Two? A. Yes.

Q. So he was from a quarter to half a mile away when he set these stakes, these corner stakes, Gates was? A. I suppose he was; yes.

Q. Did you see these stakes after he set them any nearer than from where you were panning?

A. Yes, I was on the claim helping him build the monument.

Q. You went around and examined the corner stakes afterwards?

A. No, I didn't go around. I could see them from the center of the creek.

(Testimony of Nels P. Nelson.)

Q. How close did you get to the upper stakes, or either of them?

A. I got within about 300 feet of them.

Q. Did you get close enough to examine those stakes and see whether there were any markings on them? A. No, I did not.

Q. Were these claims staked in order, one of them completed before they started on the next one, or were you working on all five of them together? [256—234]

A. I don't think McKinney's claim was completed when Gates had his staked.

Q. He and Gates were working at the same time?

A. Yes, sir.

Q. And Gates completed his first? A. Yes.

Q. You had in the meantime, prior to that, completed the staking of Discovery and begun panning on it?

A. I staked Discovery and then they drew lots, who should stake the next claim in succession.

Q. They all helped stake Discovery?

A. Yes, sir.

Q. And then McKinney and Gates went to work on #1 and 2? A. Yes.

Mr. LEEHEY.—That is all.

Cross-examination by Mr. RITCHIE.

Q. You are absolutely certain as to the location of each of these original location notices?

A. Yes, sir.

Q. That Discovery was at the upper end?

A. Yes, sir.



(Testimony of Nels P. Nelson.)

Q. And the location notice of One Below was at the upper end of that claim?     A. Yes, sir.

Q. And the location notice of #2 was at the lower end of that claim?     A. Yes.

Q. And the location notice of #3 was on the same monument, at the upper end of Three?

A. Yes, sir.

Q. There is no possibility of your being mistaken [257—235] about any of those location notices?

A. No, sir, I don't think so.

Mr. RITCHIE.—That is all.

Witness excused.

Mr. LEEHEY.—I would like to have Mr. Finnegan sworn to give testimony concerning the records in the Shushana, without prejudicing himself to address the jury, of course not to comment upon his own testimony.

Mr. DONOHUE.—We have no objection.

**[Testimony of J. J. Finnegan, for Defendant.]**

J. J. FINNEGAN, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. LEEHEY.

Q. What is your name?     A. J. J. Finnegan.

Q. Were you in the Shushana region of Alaska last summer?     A. I was.

Q. Do you know H. C. Morgan?     A. Yes, sir.

Q. Did he hold any official position, serve in any official capacity, last summer?

A. He served as United States Commissioner and district recorder.

(Testimony of J. J. Finnegan.)

Q. Did you have any duties to perform under him, in connection with his office?     A. I did.

Q. In what capacity?

A. I think the day before Morgan left the diggings, he requested that I take his records and act as his deputy, which I did.

Q. Are you the J. J. Finnegan who was afterwards appointed Commissioner [258—236] and recorder for that district?     A. I am.

Q. And how long did you serve in that capacity?

A. Well, I served from the date of receiving the notice from Judge Brown, that was October 21st—I executed my bond on that date; I served until the 14th day of November, when Mr. Dimond came in and I turned over the office to him.

Q. State the facts as to who had the custody of the records prior to the time you were appointed and subsequent to the second day of September—prior to the time you executed your bond.

A. I had the custody of the records.

Q. Are you familiar with the record books of that district?     A. I am.

Q. There are certain books here in court purporting to be the official record books of that district. You may make a statement in your own way as to matters within your own knowledge as to how those books were received and what portion of them were what may be designated as the official books or upon the official form prescribed by the government for the use of recorders. When did you first have anything to do with the office of recorder?

(Testimony of J. J. Finnegan.)

A. September 2d, 1913.

Q. And state the facts as to who took possession of the records then.

A. I took possession of certain records at that time..

Q. What do you mean by certain records?

A. Certain of the records that are present here in court.

Q. Did you take possession of a part or all of the records of the district that were there at that time?

A. I took possession of a part.

Q. There were records of that district you did not take possession of? [259—237]

A. There were.

Q. What records were those?

A. There was one book of records, I believe, at the time I took office which contained about 16 or 17 pages of recorded notices or recorded instruments, and Morgan was going over to the White River with several parties who had property over there on it; they desired to do their annual representation work and he desired to take a small volume, probably five or seven notices, with him and record the necessary work over there and then send the book back to me, which he did.

Q. Was that place he was going to also within the White River recording district? A. It was.

Q. Was that book returned to your office?

A. It was.

Q. Were there any other records of the district you did not take possession of? A. There was.

(Testimony of J. J. Finnegan.)

Q. What other records?

A. There was the original record book of the emergency recorder, Fred Wahn; at the time Morgan turned the records over to me, I didn't know of its existence; I had never examined the records in respect to that before then and knew nothing of it; and a few days after Morgan's departure several parties in the diggings asked me if I had all the records and I told them I did not, that there was one book that was missing, and I referred them to the small book Morgan had with him, which contains mostly White River instruments, pertaining to locations over on the White River, copper locations, and my informants then told me that there was still another book that was not in my possession and they called my attention to Wahn's record and I told them [260—238] I didn't have it and knew nothing of it, but when Morgan returned me the book I knew he took, he wrote me a letter and stated he had this original book of Wahn's in his possession and was keeping it for future reference, and I immediately then wrote Morgan that he should not do so, that it belonged to the office and he should return it, and later on I wrote Waller in Seattle to the same effect, and I understand when the Judge of this court was out in February, he received that record from Waller, and it is here present now.

Q. Did that book contain anything that had already been transcribed into the other book?

A. To the best of my knowledge, I have examined them and I think Waller's original records are tran-



(Testimony of J. J. Finnegan.)

scribed verbatim into Morgan's first book of record.

Q. In the book that remained in your possession?

A. In the book that remained in my possession.

Q. Who had possession of the records of the White River recording district with that exception from the 2d of September until you surrendered the office?     A. I did.

Q. Where were they?

A. On Wilson Creek until September 22d and on that day I moved to the Town of Chisana.

(By the COURT.)

Q. Who was Wahn—was he acting under Morgan, acting after Morgan was appointed Commissioner of the White River precinct?

A. No, he was elected by the miners on I think July 11th as emergency recorder.

Q. How long did he act?

A. I believe for about ten days, until the arrival of Mr. Morgan.

Q. Then he didn't act under Morgan? [261-239]

A. No, he turned his records over to Morgan and Morgan re-entered his records into his volume.

By the COURT.—I desire to say at this time that in the latter part of January of this year I was in Seattle and was called on the phone by Mr. Waller, whom I then didn't know; he told me he had an office there and desired to see me on certain matters concerning the Shushana. I called at his office and he told me he had a small book, which he showed me, that a man by the name of Wahn kept there prior to the time Morgan went in and he, Waller, had been acting as

(Testimony of J. J. Finnegan.)

deputy under Morgan. Morgan was then east somewhere—at any rate, was not in Seattle. I didn't examine the book, but I told Mr. Waller to immediately send it by registered mail to the clerk of this court at Valdez and I believe it has since been received. Mr. Waller did this and the book was sent to the clerk and is now in his custody.

Examination by Mr. LEEHEY (Continued).

Q. Is the book which you have described as the Wahn records and to which the Court has referred now in this courtroom in the custody of the clerk?

A. To the best of my knowledge it is; I never saw it before coming to Cordova.

Q. Describe the character of the books in which the records were made and kept at the time you took the office?

A. This is the Wahn record book which I had never seen before. This book is marked S. E. Ledger, about 6 inches long by 4 wide and is called the Wahn record book; what appears here as Volume One of the White River record is about nine inches wide by 13 or 14 long.

Q. Is it the book provided by the government for that purpose? [262-240] A. It is not.

Q. What is it?

A. It is a common, ordinary ledger-book. Volume One contains about 300 pages; Volume Two is about the same dimensions and contains about 150 pages.

Q. You mean an ordinary journal?

A. I think it is a journal; the first is a ledger and is so marked; Volume Two, I believe, is a journal.

(Testimony of J. J. Finnegan.)

There is no Volume Three of the records of the White River precinct; at certain times the Wahn records were called Volume Three. Volume Four is a common, ordinary book, unlined, about the dimensions of Volume 1 and 2, containing 125 pages; Volume 5 is a small journal about 5 by 8, containing 225 pages, of which 87 contain record matter, mostly all pertaining to quartz locations on the White River and its tributaries; Volume 5 is the book Morgan took with him when he left the office—took over to the White River and later returned to me.

Q. Are any of these books on the official form provided by the Government? A. They are not.

Q. Were those books you have just described received by you from Mr. Morgan, with the exception noted? A. Yes, sir.

Q. Do they include all you have received from Mr. Morgan? A. Yes, sir.

Q. What was the condition of the office with reference to documents having been fully recorded at the time you took possession of the office?

A. At the time I took possession from Mr. Morgan there was between 150 and 180 unrecorded instruments. [263-241]

Q. Why were they not recorded?

A. The record books Morgan possessed at that time were completely filled, with the exception possibly of one or two pages in certain books, and I didn't care to enter any in them.

Q. There were no other books available for record purposes? A. None in the country.

(Testimony of J. J. Finnegan.)

Q. When were the books received?

A. I received two volumes similar to this one called Volume 7 of the White River Precinct on October 2d, thirty days after I took over the office.

Q. In the meantime state what you had done with reference to recording instruments.

A. I had received instruments filed for record and had so marked them and noted them, and where parties requested it I gave them receipts for their papers, to give them something to show they had filed the instruments for record.

Q. Is that Volume 7 on the form prescribed by the Government?     A. Well, I don't think it is.

Q. You received it from whom?

A. I received it from the clerk of the court, Third Division.

Q. Do you know whether any of the other record books you have described were furnished by the clerk of the court?     A. The Morgan records?

Q. Yes.

A. No; at the time I took over the office from Morgan and for 30 days thereafter there had never been anything whatsoever received from the clerk's office in the way of furnishing the Commissioner or recorder with supplies.

Mr. LEEHEY.—That is all. [264—242]

Cross-examination by Mr. DONOHUE.

Q. Volumes 1, 2 and 4 you have testified to are well-bound books, are they not, securely bound?

A. I think they are.

Q. You are attorney in this case for the defendant?



(Testimony of J. J. Finnegan.)

A. I am.

Q. All the records in any manner pertaining to this suit are contained in Volume One, are they not?

A. I don't think so.

Q. What ones are they contained in?

A. I think the defendant's papers were filed with me when I acted as recorder and they are entered in Volume 6—I mean the plaintiff's.

Q. All the records in any any manner pertaining to the defendant's right to the land in controversy are recorded in Volume One, are they not?

A. I think so.

Q. You are positive of that fact? Examine the books carefully.      A. Yes, they are.

Q. There were twenty pages left in Volume One after the last instrument of the defendant, in any way connected with this case, was recorded? It is a fact, is it not, that the last instrument was recorded on page 280, the so-called power of attorney?

A. Yes.

Q. There are three hundred pages in that book?

A. Yes.

Q. There were no instruments connected with the defendant's title to the land in controversy unrecorded when you took charge of the office?

A. No, sir. [265—243]

Q. And the only book of record that in any way concerns the defendant's alleged title to the property in controversy is contained in Volume One?

A. Yes, sir.

Q. And that is a well-bound, substantial volume?

(Testimony of J. J. Finnegan.)

A. Yes, sir.

(By Mr. LEEHEY.)

Q. Your testimony does not include the proof of labor filed on this claim?      A. No, sir.

Mr. LEEHEY.—Defendant now offers a certified copy of the order of this court entered May 7, 1913, creating the White River Precinct and Recording District, Third Division, Territory of Alaska, and the order appointing Mr. Morgan Recorder.

Admitted without objection, marked Defendant's Exhibit 5, attached hereto, and made a part hereof.

Mr. LEEHEY.—The defendant will also offer in evidence a certified copy of the proof of annual labor, including a number of claims, this one among others. The defendant does not regard this as an issue or material in this case, but we offer it for what it may be worth; the copy is certified by the clerk, the record of the White River district or at least this portion being now in the custody of the court and being the same as though certified by the district recorder.

Mr. DONOHOE.—To which offer plaintiff objects on the ground that when the witness McKinney was on the stand—he made this affidavit—on an objection by defendant, we were precluded from cross-examining him as to the assessment work and my remembrance of it is that counsel then stated he did not propose to put in any proof on assessment work, and on that statement the Court sustained the objection. [244—266].

By the COURT.—I understand that the objection

(Testimony of J. J. Finnegan.)

to your further examination was on the ground that it was not proper cross-examination; at that time there was no testimony in on that subject.

Mr. DONOHOE.—That being the case, Mr. McKinney having sworn to this, we ask that he be again placed on the stand so that we can complete our cross-examination.

By the COURT.—I think this is competent testimony by statute and is made *prima facie* evidence of the facts therein stated.

Objection overruled and request denied. Plaintiff allowed an exception to the ruling.

Proof of labor admitted as Defendant's Exhibit #6. Copy is attached hereto and made a part hereof.

Witness excused.

Defendant rests.

**[Testimony of J. J. Ford, for Plaintiff (Recalled in Rebuttal).]**

J. J. FORD, recalled as a witness for the plaintiff in rebuttal, testified as follows:

Direct Examination by Mr. DONOHOE.

Q. At the time of the location of the Surprise Fraction, had there been any work done on that ground by way of assessment work or development work upon it? A. No, sir.

Q. How long after—state the date—the location of the Surprise Fraction and the ground embraced within it did anyone, other than yourself and Mr. Sutherland, come upon that land to do any [267—245] assessment work or development work?

(Testimony of J. J. Ford.)

A. September second.

Q. Who was it that came there that day?

A. McKinney.

Q. Have you in your possession a diary, kept of your transactions and observations in connection with the Surprise Fraction, commencing and including the second day of September and ending about the 7th or 8th of September?

A. I have notes I made there on the ground.

Q. Notes made at the time?      A. Yes, sir.

Q. Each day?      A. Yes, sir.

Q. Will you produce those notes with relation to the assessment work? (Witness does so.)

A. May I explain these notes?

Q. Yes.

A. Part of the time I was up there it was raining and the book would get wet and I had some writing paper and I carried that in my pocketbook, made my notes there, and afterwards, at the camp, I copied it into this book. I think I wrote on the paper first—I think I wrote the notes on the paper and copied it in here after.

Q. When did you copy it in that book?

A. About the 7th or 8th of September.

Q. You copied them from the memoranda you made on the particular days?

A. I did, and I know they are exact.

Q. Now, turning to your notes on the second day of September, state how much work was done upon the land in controversy by Mr. McKinney [268—246] or other person, other than yourself.



(Testimony of J. J. Ford.)

Mr. LEEHEY.—Defendant objects to this testimony as incompetent, irrelevant and immaterial, if it is offered for the purpose of disputing the performance of the annual labor; that question cannot possibly be involved in this case. The only purpose of filing our certificate of proof of annual labor is simply to show the good faith of the parties and continued exercise of acts of ownership over the property. The question of annual labor is not in issue in this case according to our contention, their location having antedated January 1, 1914, and no possible forfeiture could occur before that time. Objection overruled. Defendant allowed an exception.

Q. Who appeared upon this claim on the second day of September to do assessment work?

A. McKinney.

Q. Alone? A. Yes, sir.

Q. Were you upon the claim all that day while McKinney was there? A. I was.

Q. State what work he did by way of assessment upon that day.

A. He went down about 300 feet below our initial monument and started a cut in the bank.

Mr. LEEHEY.—This all goes in under the same objection.

By the COURT.—Yes, sir; and exception is allowed.

Q. How many hours did he work on that day?

A. Between five and six hours.

Q. Did he leave the premises before you did that day? A. He did.

(Testimony of J. J. Ford.)

Q. That was the second day of September?

A. That was the second day of September.

Q. On the third day of September, did McKinney come upon the [269—247] property?

A. He did.

Q. Alone?      A. He came on the property alone.

Q. Did he do any assessment work on that day?

A. He did.

Q. Were you there before McKinney came on the property?      A. I was.

Q. Did you remain until after he had left the property?      A. I did.

Q. How many hours did he work that day?

A. He worked five to seven hours.

Q. Was there anyone else with him that day working?      A. There was.

Q. Who?

A. There was a gentleman working on McKinney's claim, on One Below, that came down later and joined him that day.

Q. How many hours did the man who joined him work?

A. He worked about four hours, three or four hours.

Q. Anybody else work on there with McKinney that day?      A. No, sir.

Q. On the fourth day of September, were you there before McKinney came?      A. I was.

Q. Did you remain there until after he left?

A. I did.

Q. Did McKinney do any work on that claim that

(Testimony of J. J. Ford.)

day? A. He did.

Q. How many hours?

A. About seven or eight,—not more than that.

Q. Was there anybody else with him? [270—  
248]

A. This gentleman, I was trying to remember whether he came down with him or joined him there later—I know he worked with him that day again.

Q. The same man that worked with him the day before? A. Yes, sir.

Q. How many hours did that gentleman work?

A. He worked probably four hours, not any more.

Q. On the 5th day of September, did McKinney show up? A. No, sir.

Q. Did anybody else show up? A. No.

Q. You were there all day? A. I was.

Q. On the 6th day of September, were you there then? A. I was there on the 6th, yes.

Q. Did McKinney show up that day?

A. No.

Q. Did anybody else?

A. No; he took his tools home on the night of the fourth—may I correct one statement?

Q. Yes.

A. On the 2d this gentleman that was working on One Above came down to work—about half a day on the second.

Q. How many days' work for one man did Mr. McKinney of his associates or the men who were with him work upon the ground in controversy from the time Sutherland located the claim up to and includ-

(Testimony of J. J. Ford.)

ing the sixth day of September?

A. Not more than five days.

Q. Five days for one man?

A. Yes, sir; that is allowing good time. [271—249]

Q. What was the going wages of that camp for that kind of work at that time? A. \$12.50 a day.

Q. That would be \$62.50 worth of work?

A. Yes, sir; \$62.50 worth of work.

Q. You were there each day?

A. I was there each day. Mr. Schultz was down in the cut an hour and he might have used a shovel during that hour—I don't think he did, and he went back down where he was working below.

Cross-examination by Mr. LEEHEY.

Q. You said you were on this property prior to the 30th of August?

A. I wasn't on the Surprise Fraction prior to that? You mean we hadn't located it or I had not been on it?

Q. Were you ever on it prior to August 30th?

A. Yes, I was up and down that part of the creek.

Q. When were you first on the property?

A. That day we came over there; it seems to me it was somewhere around the 20th to the 23d. I am not very sure of that date.

Q. How long were you there that day?

A. I should think perhaps an hour, or perhaps two hours.

Q. When were you next there?

A. It might have been a day or two later that I



(Testimony of J. J. Ford.)

was over there again.

Q. How long were you there the second time?

A. I was there probably between an hour and two hours, up and down that part of the creek—not on that claim.

Q. When were you there the next time?

A. To the best of my recollection the next time was when I went down with Sutherland on the 30th.

Q. To locate it? [272—250]      A. Yes, sir.

Q. Then you were there twice before you located the ground on August 30th?

A. Yes, sir, I believe I was.

Q. Not more than an hour or so, or in that vicinity, each time?

A. Not more than an hour or two hours. I don't remember the exact time.

Q. You claim to have a cut on that property 40 feet long by about 4 feet wide?

A. The cut put in there is 45 feet long, as I remember, somewhere about 2 to 2½ feet deep and that wide, a little wider.

Q. What are the dimensions of that again?

A. About 45 feet, as I remember, long.

Q. And about how deep?

A. 2 or 2½ feet deep—I think it is full 2½ feet deep and 2½ feet wide.

Q. Did you ever see McKinney's cut?

A. Yes, sir—we had another cut besides that one.

Q. Who had?      A. We had.

Q. You had a smaller cut besides that?

A. About 18 feet long, yes, and deeper—trying to get rim rock.

(Testimony of J. J. Ford.)

Q. McKinney claims a cut 40 feet long and 41½ feet deep and about the same width?      A. Yes, sir.

Q. Has he such a cut?

A. He has a cut between 35 and 40 feet, yes, and about that depth.

Q. About 41½ feet deep?

A. Yes, I think it would be, on an average.

Q. Yours is only about two feet deep?

A. Yes; I was working in the creek bottom and hit this frost, and [273—251] rocks in it and it was hard to make progress, and boulders and stuff, and McKinney was working in a bank of fine wash, a little bit harder than throwing sand up.

Q. You have no knowledge of the number of days' work that might have been done there by somebody on behalf of the defendant prior to the time you came there, August 30th?

A. There was no sign of any work there—I was up and down the ground several times looking.

Q. It has a gravelly creek bed?

A. That is a gravel country; yes.

Q. And there is how much water flowing in the creek that season?

A. About a sluice-head when I was there.

Q. Do you know anything about the flow that was there subsequent to the 6th of July?

A. It doesn't show a very heavy flow.

Q. You were not there until about the 20th of August?      A. No.

Q. And therefore have no personal knowledge what work might have been done on the ground prior to that time?

(Testimony of J. J. Ford.)

Mr. DONOHOE.—We object to that; McKinney testified he was not there working on the ground prior to the time Sutherland made his location.

Objection overruled. Plaintiff excepts.

A. I have every knowledge that a man could have; I went over the ground, went up and down and looked it over for stakes and work; it isn't a country of big timber, is not covered very thickly with brush.

Q. The substance of it was that you made up your mind there was no work done before you came there?

A. Yes.

Q. And you reached that conclusion from your surface examination [274—252] of it, but you don't know it from personal knowledge, do you?

A. I wasn't there before then.

Q. And therefore don't have personal knowledge of what work might have been done prior to August 30th?

A. They couldn't have done any without it showing.

Q. But you didn't have any personal knowledge of it? A. No.

(By Mr. DONOHOE.)

Q. You made a careful examination of that property, did you, on or about the 30th or 31st of August, to see whether there had been any work previously done on the ground? A. Yes, I did.

Q. In regard to that place where McKinney was working, what did McKinney say to you in regard to coming over where he was working so as to make a big showing or anything to that effect?

(Testimony of J. J. Ford.)

A. He came to the cut, where I started to cut the creek bottom, and looked over it and said, "Say, kid, why don't you come over to the bank where it is easy shoveling and make a showing?" and I told him I was "doing all right where I am."

Mr. RITCHIE.—We wish to make an objection to the sufficiency of this affidavit of annual labor and therefore ask the Court to open the case for that purpose, and I want to call the Court's attention to the fact that it does not comply with the requirements of the statute, and is insufficient for showing annual assessment work or anything else; the affidavit is insufficient in at least two particulars.

By the COURT.—I don't think it is necessary to open the case—it was admitted without objection. Plaintiff excepts to ruling.

Witness excused. [275—253]

**[Testimony of O. A. Tucker, for Plaintiff (Recalled in Rebuttal).]**

O. A. TUCKER, recalled as a witness in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. RITCHIE.

Q. When were you last on claim #2 Big Eldorado Creek in the Shushana district?

A. The 16th of September.

Q. How long was that after your last previous visit?

A. I was there on the first and then on the 16th.

Q. You were there twice? A. That is all.

Q. On the 16th did you go around and examine the



(Testimony of O. A. Tucker.)

stakes and monuments at all of the claim known both as #2 of defendant and plaintiff's Surprise Fraction?

A. I knew it as the Suprise Fraction.

Q. Did you examine the monuments or stakes at all on the 16th of September?

A. Yes, I made an examination of the stakes and the corners to see if there was any evidence of any location by Purdy or by Gates.

Q. State what examination you made and what you found, if anything.

Mr. LEEHEY.—We object to that as not rebuttal.

By the COURT.—Didn't you testify when you were on the stand before in this case that you examined those four willow posts or stakes around #2 Below and they had no markings on them that you could see or read?

A. I don't think I was asked that question—I wasn't asked that particular question, as I recall it.

Objection overruled. Defendant excepts.

A. I have made an examination of those four stakes to see if I had been mistaken about the markings—made a careful examination [276—254] to see whether there was any markings on them and I couldn't discover any markings.

Q. This was on the 16th?

A. This was on the 16th.

Q. Did you find anything, or any evidence that there has been markings?

A. I did not.

Witness excused.

[Testimony of Wm. M. Hertsberg, for Plaintiff (in Rebuttal).]

WM. H. HERTSBERG, a witness called and sworn in behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination by Mr. RITCHIE.

Q. What is your name?      A. Wm. M. Hertsberg.

Q. Where do you reside?      A. McCarthy.

Q. How long have you resided at McCarthy?

A. About two years.

Q. What is your business?      A. Miner.

Q. Were you ever in the Shushana district?

A. Yes.

Q. When did you go in there?

A. We started in there on the first of July, 1913, and landed there about the 8th.

Q. Were you ever on Big Eldorado Creek?

A. Yes.

Q. When?      A. I was there on the tenth of July.

Q. Was that your first visit there? [277—255]

A. Yes.

Q. On what part of the creek were you? State what part you visited that day.

A. Why, I came over from Gold Run and down on what was called Number Four Below.

Q. Where did you strike the creek?

A. Number Four Below.

Q. What did you see there in the way of monuments, when you first struck the creek?

A. There was a monument there.

Mr. LEEHEY.—We object to any testimony as to

(Testimony of Wm. H. Hertsberg.)

what he saw at #4 as immaterial and move to strike the answer.

Mr. RITCHIE.—We want to show what was done by all these men working in company that day as to marking their claims and posting their location notices.

By the COURT.—The objection will be sustained as to 4—you may show it as to Discovery, One, Two and Three.

Plaintiff allowed an exception to the ruling.

Q. After passing the monument on Number Four where did you go?     A. I went up the creek.

Q. Did you see any other monument?

A. Yes, I saw Number Three.

Q. Did you examine it?

A. I just read the lower part of the notice.

Q. Did you find a notice?     A. Yes.

Q. The notice of Three?

A. Yes, it was a board there.

Q. Which end of Number Three was that?

A. It was the upper end, of course; it read downstream.

Q. Did you proceed further up the stream? [278—256]     A. Yes, sir.

Q. Did you see any other monument?

A. Yes, I walked up further.

Q. What other monument did you see?

A. I saw Number Two monument.

Q. Was there any notice there?     A. Yes.

Q. What did you find, if anything, in the way of a notice and monument on Number Two?

(Testimony of Wm. H. Hertsberg.)

A. I found the same of a board, location notice, there.

Q. Did you read it?

A. Only the lower part of it; I was coming up the creek and I just looked over the notice.

Q. At which end of Number Two was that?

A. Well, it was the next above—there is one location notice on each claim.

Q. How far was the notice of #2 from the notice on #3?

A. It was about a quarter of a mile, I judge,—a claim length.

Q. Did you go further up the creek and see any other monument with a notice in it?

A. Yes, I went as far as the forks.

Q. After passing this monument at this end of #2, what did you see next in the way of a monument?

A. There was one on Number One.

Q. Did you read the notice?

A. Yes, in a general way.

Q. How did that read?

A. It was locating downstream.

Q. Did you proceed above Number One on any claim?

A. Well, I was up as far as Discovery.

Q. Was there a monument there on Discovery with the location notice? [279—257] A. Yes, sir.

Q. How did that read?

A. I can't remember; it was locating downstream, all of them what I saw.

Mr. RITCHIE.—That's all.



(Testimony of Wm. H. Hertsberg.)

Cross-examination by Mr. LEEHEY.

Q. You have jumped several claims in that region yourself, have you not?     A. I didn't jump.

Q. You are plaintiff in one of these Shushana cases?     A. One.

Q. Hertsberg against Doyle?     A. Yes, sir.

Q. That involves a contest over a placer mining claim in the Shushana region?     A. Yes, sir.

Q. A claim Mr. Doyle claims to have located prior to the time you located?     A. Yes, sir.

Q. Are there any other locations you made up there involving rival locations?     A. No.

Q. Are you interested with other parties in any of these other suits?

A. Well, I guess in a general way.

Q. Are you interested in any other claims that have been staked over locations claimed to be prior to them?

A. I am interested with George Wulf.

Q. He is the plaintiff in some of these cases?

A. Yes.

Q. Are you interested with anybody else? [280—258]     A. No.

Q. How long were you in the Shushana?

A. I came in the 8th of July and I went out about Thanksgiving.

Q. Were you in there continuously from the 8th of July on?     A. Yes, sir.

Q. What did you do in that time?

A. I was prospecting and doing assessment work.

(By Mr. RITCHIE.)

Q. Mr. Doyle is the gentleman who was on the wit-

(Testimony of Wm. H. Hertsberg.)

ness-stand a while ago, one of the parties who plastered half the Shushana district with location notices?

Mr. LEEHEY.—We object to that.

By the COURT.—The objection will be sustained and the Jury will be instructed to pay no attention to the remarks of counsel unless it is borne out and sustained by the testimony you yourselves have heard from the witnesses.

Witness excused.

Testimony closed. Whereupon court adjourned until to-morrow (Friday), April 3, 1914, at ten o'clock A. M.

Friday, April 3, 1914—Morning Session.

Mr. DONOHOE.—Pursuant to an agreement between counsel we at this time desire to offer in evidence Volume One of the Records of the White River recording precinct, the entire book.

By the COURT.—These books were brought out upon the order of this court from the Shushana, under seal, by Mr. J. J. Finnegan, with the understanding that they should be delivered to the clerk of this court with the seals unbroken and at the expense of Mr. O. A. Tucker, at whose request this was done; and that they would be returned by Mr. Finnegan to the recorder under seal when they [281—259] were through with them here at this term of court, also at the expense of Mr. Tucker, who agreed to see that the expense of bringing them here and taking them back was paid—this to be done by the 15th of this month if it is found necessary to return these

books at that time to the Shushana or White River precinct where they belong; that either party desiring to use them or to have them properly transcribed and made part of the record must do so before that time, or must have the transcript made by the recorder at the White River precinct, the intention of this being that the books shall not be detained here longer than the 15th of this month. It may be that Mr. Finnegan will not be returning to the precinct until later, in which event the time may be extended by order, the intention being that the books shall not be required to be kept here longer than he may be returning to take them back. The book may be admitted with this understanding. (Vol. 1 admitted as Dfts. Ex. 7.)

(It was subsequently agreed between counsel that a transcript of this exhibit need not be forwarded with this record.)

Whereupon counsel addressed the Jury and at 1 P. M. recess was taken until 2.

#### AFTERNOON SESSION.

##### **[Instructions of the Court to Jury.]**

By the COURT.—Gentlemen of the Jury: In instructing you as to the law, it will be your duty to accept as the law what I will now read to you, which will be handed you to take with you to the jury-room. If I am in error as to just what the law is, the party who feels prejudiced by it has his right of appeal and the matter may be determined finally and in an orderly manner. But if each juror was permitted to exercise his own opinion as to what was the law, there would be endless confusion and no possibility of ar-

iving at a verdict at all. The principal question for you to decide in this case is quite [282—260] simple, to wit: Did the plaintiff or did the defendant first in point of time make a discovery of valuable mineral and do the other acts necessary to complete a valid location of the placer mining claim in dispute.

The person who first, in point of time, makes such discovery of valuable mineral and completes his location has the better right and is entitled to the possession of the ground.

In determining this question you will have to consider the law relating to the locating of placer claims and the law and rules of evidence concerning the testimony which you have heard in this case.

The defendant claims to have made a location through Gates, as his attorney in fact, on July 6th, 1913, on which day he claims to have made a discovery of valuable mineral, marked the boundaries of his claim so that the same could be readily traced and on July 27th, 1913, filed his location certificate with the recorder of the White River Precinct and on the 29th of July, 1913, claims to have filed the power of attorney from the defendant Purdy to Gates with the said recorder.

If you find from the evidence that these acts were done at the times and in the manner testified to by the defendant and his witnesses, then your verdict should be for the defendant.

Plaintiff claims that on August 30th, 1913, the said mining ground in dispute in this case was unclaimed and unlocated and *appropriated* public mineral land of the United States, and *that made* a discovery of



valuable mineral thereon, marked the *bound* of his claim and on the 7th day of October, 1913, caused to be *corded* in said precinct certificate of location as provided.

If you find by a preponderance of the evidence that said [283—261] ground was unclaimed, unappropriated and unoccupied public mineral land of the United States on said 30th day of August, 1913, and that plaintiff performed all of said acts necessary to constitute a valid location, as will be defined in these instructions, then you should find for the plaintiff.

The jury are instructed that the burden of proof in this case is upon the plaintiff, who must establish the facts alleged in his complaint by a fair preponderance of the evidence. The jury, however, are the judges of the effect and value of the evidence and the weight which is to be attached to the testimony of each witness.

This power of judging the effect of evidence is not arbitrary, but is to be exercised by you with legal discretion and in subordination to the rules of evidence. You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence, satisfying your minds. But you are to consider all the evidence and determine the weight and importance to be attached to the testimony of each witness, and unless you are satisfied that there is a fair preponderance of the testimony in favor of the plaintiff, your verdict must be for the defendant.

By a preponderance of the evidence is meant that

where the evidence is equally balanced, so that you are in doubt as to what to believe, you must resolve that doubt against the one having the affirmative of the question. In this case the plaintiff has the affirmative, and before you can find for plaintiff, he must prove by a preponderance of the evidence that he has the better right to the ground in dispute, and he must rely upon the strength of his own right and not on the weakness of the defendant's right. [284—262]

You are instructed that the affirmative of any issue must be proven by the party asserting the affirmative and in this case the burden of proof is upon the plaintiff to establish the affirmative of the issue in this case by a fair preponderance of the evidence, and you are instructed that evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is within the power of one side to produce and of the other side to contradict. If weaker and less satisfying evidence is offered when it appears that stronger and more satisfying evidence was within the power of the party to produce, the evidence should be viewed with distrust.

You are instructed that if you believe any witness in this case willfully testified falsely in one part of his testimony, you may distrust his testimony in other parts.

You are instructed not to pay any attention to the remarks of attorneys on either side in this case except so far as they agree with the evidence in the case, and the law as given you by the Court.

On July 6th, 1913, at the time defendant claims to have made his location, the law in Alaska required

that the locator must make a discovery of valuable mineral and mark the boundaries of his claim in such a manner that the same could be readily traced. It did not require that the locator should post a notice of location on the claim, or that he should even file the location notice with the recorder, but that he may do either or both of these acts, but the location is not invalid by reason of failure to do either or because there is a mistake in the calls or courses or distances given in either a notice posted on the ground or a notice filed for record. [285—263]

Where a location is made by an attorney in fact for another he must be duly authorized thereto by a power of attorney, in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made, in this case the Third Judicial Division of Alaska. You are instructed that such power of attorney need not be so recorded prior to the first step taken in making the location and if you believe from the evidence in this case that the defendant Purdy executed a power of attorney, in writing, to G. L. Gates prior to July 6th, 1913, and that the same was duly acknowledged, and that on July 29th, 1913, said power of attorney was given to the recorder for the White River Precinct of Alaska for record and the recording fees paid, then the defendant sufficiently complied with the law in that regard.

You are instructed that if you find from a fair preponderance of the evidence that the defendant Purdy executed a power of attorney, in writing, authorizing the said Gates to locate placer mining claims for said



Purdy in Alaska, and that the same was duly acknowledged, and recorded in the White River Recording District, and if you further find from a fair preponderance of the evidence that the boundaries of the placer claim No. 2 Below Discovery on Eldorado Creek were sufficiently marked on the ground, then you should disregard any errors in the notice posted on the claim, and your verdict should be for the defendant.

You are instructed that while under the laws of Alaska in force prior to August 30th, 1913, it was not actually necessary to post a notice of location upon a placer mining claim, nor even to record the location notice, yet it was the custom to do either or both these acts. Where the location notice was recorded, the legal [286—264] effect of it was to give constructive notice of the location to all persons and where the notice was posted on the ground, it was for the purpose of aiding in ascertaining the boundaries of the claim, but failure to post any notice on the ground or even to record the location notice did not render the location void.

You are instructed that a record of a mining location authorized by law is constructive evidence to all parties of the contents of such record, and if you find from the evidence that the location notice of the defendant Purdy was duly recorded in the office of the Recorder of the White River Precinct and Recording District of Alaska, prior to the time of the alleged location by the plaintiff Sutherland, then the plaintiff Sutherland is conclusively deemed to have notice of such location, whether he had actually ex-



amined the recorded notice or not.

Lindley on Mines, sec. 392.

You are instructed that if you find from the evidence that the alleged location for the defendant Purdy of the claim designated as No. 2 Below Discovery on Eldorado Creek was properly marked on the ground on July 6th, 1913, so that its boundaries could be readily traced, then it is immaterial whether such markings remained in place on August 30th, 1913. If such marks had become obliterated or were even totally destroyed by other persons, it would not affect the validity of the location.

You are instructed that under the laws of Alaska in force on July 6th, 1913, while the locator of a placer mining claim was required to mark the boundaries of such claim by proper monuments, so that such boundaries could be readily traced, yet there was no particular form of marking the boundaries prescribed by law, and [287—265] any corner monuments or stakes or other markings sufficient to indicate the claim upon the ground with reasonable certainty to those inspecting the same were sufficient in law.

You are instructed that while posted or recorded notices are an aid in determining the boundaries of a claim and the position of the monuments which mark such boundaries, yet it is the boundaries as marked on the ground by proper stakes or monuments which really define the limits of the location, and if a difference exists *exists* between the descriptions given in the notice as posted on the ground and the stakes or other monuments established thereon,

then the monuments govern and control, and are to be considered as correctly indicating the tract of ground included within the location of such mining claim.

Lindley on Mines, sec. 373, page 877.

On August 30th, 1913, the time when plaintiff claims to have made his location, an Act passed by the Territorial Legislature of Alaska was in force and it required that in order to make a location of a placer mining claim, the locator—

“must at the time of discovery post conspicuously at the point of discovery, a notice of location thereof, containing (a) the name or number of the claim; (b) the name of the locator or locators; (c) the date of discovery and posting of notice as in this section provided for; (d) the number of feet in length and width claimed; the notice herein described shall be known as the location notice.

At the time of posting the notice of location, he shall distinctly mark the location on the ground so that its boundaries can be readily traced, by placing at each corner or angle thereof substantial stakes or posts not less than three feet high, above the ground and three inches in diameter and hewed on the side or sides facing the claim, or by placing at each corner or angle thereof mounds of earth or rock not less than three feet high. Whatever monument is used it must be marked with the name or number of the claim and the designation of the corner by number, and the monument nearest the discovery

shall be the initial post, stake or monument, and shall be post, stake or monument number one; and further the corners shall be numbered in regular rotation. If the [288—266] claim is located on ground that is covered wholly or in part with brush or trees, such brush shall be cut and trees be marked or blazed along the lines of such claim to indicate the location of such lines. If located in an open country the boundary lines shall be marked by placing line stakes or line monuments so as to readily lead from corner to corner of such claim.

Within ninety days from the date of discovery, and prior to the filing of the certificate of location as provided in the following section the locator or locators shall perform labor upon such claim in developing the same, to an amount which shall be equivalent in the aggregate to one hundred dollars' worth of such work for each twenty acres or fractional part thereof, contained in such claim, and such work shall be known and shall constitute 'location work.'

\* \* \*

Within ninety days after the discovery the locator shall record with the recorder of the precinct wherein such claim is situate, a certificate of location. Such certificate shall contain:

- (a) The name or number of the claim.
- (b) The name of the locator or locators.
- (c) The date of discovery and posting of the location notice.

(d) Number of feet in length and width claimed.

Such certificate shall also set forth a description of the location of such claim with reference to some natural object, permanent monument or well-known mining claim; a description of the boundaries, corner monuments and markings thereon, and a description of the location work and the place where the same has been performed. Such certificate of location shall not be accepted for record by the precinct recorder unless the same be verified before the recorder of the precinct or some officer authorized to administer oaths, by the locator, or one of the locators, if there be more than one, or by the authorized agent, having personal knowledge of the facts required to be stated therein."

You are instructed that a mining location cannot be initiated by trespass and that no person is entitled to enter upon ground lawfully in the possession of another, against his will and without his consent, for the purpose of prospecting or locating a mining claim thereon and that any such attempted location is wholly void.

*Bilk v. Meagher*, 104 U. S. 279, 26 Law Ed. 735.

*Lindley on Mines*, 3d ed., secs. 217-218.

You are further instructed that although the law requires the locator to mark the boundaries of his claim, it does not require him to maintain or perpetuate the boundaries once established, and where a mining claim is once sufficiently marked on the ground, and all other acts of location are performed,



a right vests in the locator which cannot be divested by the subsequent obliteration [289—267] of the marks or removal of the notice or monuments without the fault of the locator.

Lindley on Mines, 3d ed., sec. 375.

Tonapah etc. v. Tonopah Mng. Co., 125 Fed. 389-391.

All persons are equal before the law. You should not allow either sympathy or prejudice to influence you. The terms "claim jumpers" or "claim grabbers" should not distract your attention.

If the ground was not located on August 30, 1913, the plaintiff had a perfect right to locate it without being called a claim jumper.

On the other hand, if defendant Purdy caused the ground to be first located, and complied with the law as given you in these instructions, he should not be called a claim grabber, even though he did not live in Alaska. It is not claimed he located a greater number of claims than the law permitted him to do.

You are instructed that the plaintiff cannot recover in this action by reason of any failure of the defendant to perform the annual assessment work required by law on the placer claim designated as No. 2 Below Discovery on Eldorado Creek, and even if you believe from the evidence that the defendant failed to perform the annual assessment work on said placer claim for 1913, the plaintiff can claim no advantage by reason of such failure, and any such failure would affect only the right of defendant to a decree of this court quieting his title against the plaintiff, and defendant's right to such a decree is

to be determined by the Court.

I herewith submit to you two general forms of verdict, one finding for the plaintiff and the other finding for the defendant. [290—268] When you have arrived at your verdict you will have your foreman sign the one you find and return it into Court.

I also submit two questions to be answered by you either Yes or No. In addition to signing the general verdict for either the plaintiff or the defendant, you will have your foreman sign the two questions, after writing in your answer, either Yes or No, to each of said questions, and return the same into Court.

You may take with you the pleadings in this case and all the papers and exhibits introduced in evidence in the case.

FRED M. BROWN,  
District Judge.

Dated at Cordova, Alaska, this 3d day of April, 1914.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 3. 1914. Arthur Lang, Clerk. By K. L. Monahan, Deputy. [291—269]

The Judge having finished reading his instructions—

Mr. DONOHOE.—I desire to have the record show the ordinary stipulation, which is agreed upon by counsel for both sides, that either side may have five days from the return of the verdict in which to take exceptions to the instructions.

By the COURT.—Very well; it will be so agreed.

Whereupon the Jury retired to deliberate upon its verdict. [292]

**[Certificate of Official Stenographer to Transcript of  
Testimony.]**

I do hereby certify that I am the Official Court Stenographer for the Third Judicial Division, Territory of Alaska; that as such official stenographer I reported the proceedings in the trial of the above-entitled cause, to wit, Dan D. Sutherland versus Frank W. Purdy, #C/73 of the files of said court; that the above, consisting of two hundred and sixty-nine (269) typewritten pages, is a full, true and correct transcript of the testimony introduced at said trial.

Dated at Valdez, Alaska, June 10, 1914.

ISAAC HAMBURGER. [293]

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*In the District Court for the Territory of Alaska,  
Third Division.*

C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Request for Special Findings.**

The defendant requests the Court to instruct the jury to render a special verdict in this action and to answer specifically the following questions:

I.

Did the defendant Purdy execute and deliver to G. L. Gates a power of attorney in writing prior to

July 6th, 1913, and was the same duly acknowledged and thereafter recorded with the recorder of the White River Recording District of Alaska?

II.

Was the placer mining claim designated as No. 2 Below Discovery on on Eldorado Creek in the White River Recording District of Alaska staked on the ground and its boundaries sufficiently marked by stakes or monuments at the time of the alleged location of such claim on the behalf of the defendant Purdy?

MAURICE D. LEEHEY,  
J. J. FINNEGAN,  
Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 3, 1914. Arthur Lang, Clerk. By K. L. Monahan, Deputy. [294]

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*In the District Court of the Territory of Alaska,  
Third Division.*

C-73.

DAN SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Exceptions to Instructions.**

Now comes the plaintiff and pursuant to stipulation made in open court in the presence of the jury at the close of the Court's instructions to the jury by counsel for the parties respectively, files this his



exception to the Court's refusal to give certain instructions offered in writing in behalf of plaintiff, and to certain instructions given by the Court, to wit:

I.

Plaintiff excepts to the refusal of the Court to give to the jury the instructions asked by plaintiff numbered 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, respectively, which were presented to the Court in writing.

II.

Plaintiff excepts to so much of the instructions given by the Court as reads as follows on the first page thereof:

"The defendant claims to have made a location through Gates as his attorney in fact, on July 6th, 1913, on which day he claims to have made a discovery of valuable mineral, marked the boundaries of his claim so that the same could be readily traced, and on July 27th, 1913, filed his location certificate with the recorder of White River Precinct, and on the 29th day of July, 1913, claims to have filed the power of attorney from the defendant Purdy to Gates with the said recorder.

"If you find from the evidence that these acts were done at the times and in the manner testified to by the defendant and his witnesses, then your verdict should be for the defendant."

On the ground that the same is contrary to the provisions of the act of Congress approved August 1, 1912, and contained in [295] section 129, subdivisions a, b, c, d and e of the Compiled Laws of

Alaska, of 1913, in this, that said act requires a power of attorney authorizing an attorney in fact to locate placer mining claims in Alaska to be in writing, duly acknowledged, and recorded in a recording precinct within the judicial division wherein the location is made. This act requires the power of attorney to be recorded before the attorney in fact takes the first step in the location of a mining claim under it, and in any event requires the recording of the power of attorney before the location of the claim is completed. The uncontradicted testimony shows that the alleged power of attorney from Purdy to Gates was not filed for record until long after the alleged location of the claim.

### III.

Plaintiff excepts to the following instruction given on page 7 of the instructions given by the Court, to wit:

“On July 6th, 1913, at the time the defendant claims to have made his location, the law in Alaska \* \* \* did not require that the locator should post a notice of location on the claim, or that he should even file the notice of location with the recorder, but that he may do either or both of these acts, but the location is not invalid by reason of failure to do either or because there is a mistake in the calls or courses or distances given in either a notice posted on the ground or a notice filed for record.”

On the ground that the same does not correctly state the law, in this, that if a locator does place upon

a mining claim a notice of location describing the directions in which the claim lies, then he is bound by the description contained in the notice as to directions in which the claim lies, and said notice so posted thereupon becomes part of the markings upon the ground to assist a subsequent prospector in readily tracing the boundaries of the claim upon the ground.

#### IV.

Plaintiff excepts to so much of the instruction given on page 7 of the Court's instructions, in the second paragraph thereof, after the statement of the requirements of the law as to the power of attorney to locate placer claims, as reads as follows, to wit:

“You are instructed that such power of attorney need not be [296] recorded prior to the first step taken in making the location, and if you believe from the evidence in this case that the defendant Purdy executed a power of attorney in writing to G. L. Gates prior to July 6th, 1913, and that the same was duly acknowledged, and that on July 29th, 1913, said power of attorney was given to the recorder for the White River Precinct of Alaska for record and the recording fees paid, then the defendant sufficiently complied with the law in that regard.”

On the following ground: That the same is contrary to the provisions of the act of Congress of August 1, 1912, which requires such a power of attorney to be of record prior to any step in location, the specified requirements of the law as to a power of attorney being merely qualifications of the agent to act and not any part of the procedure in location of a mining claim.

## V.

Plaintiff excepts to the instruction given on page 8 of the Court's instructions, as follows:

"You are instructed that if you find from a fair preponderance of the evidence that the defendant Purdy executed a power of attorney in writing authorizing the said Gates to locate placer mining claims for said Purdy in Alaska, and that the same was duly acknowledged, and recorded in White River Recording District, and if you further find from a fair preponderance of the evidence that the boundaries of the placer claim No. 2 Below Discovery on Eldorado Creek were sufficiently marked on the ground, then you should disregard any errors in the notice posted on the claim, and your verdict should be for the defendant."

On the ground that said instruction fails to state the law in failing to state that all the acts necessary to make the power of attorney sufficient under the law must be complete before any step in location by the attorney, including the filing of the power of attorney for record. And on the further ground that the notice posted on the claim becomes and is a part of the markings upon the ground by which the boundaries of the claim are to be readily traced. In this case it is admitted by all the evidence that the notice posted on the ground described the claim as running 1320 feet upstream from the notice, the plaintiff claiming that the notice was posted at the upper end of the claim and the defendant claiming the notice was posted at the lower end of the claim.



The question which should have been submitted to the jury on this point was, on which end of the claim was the notice posted? [297]

## VI.

Plaintiff excepts to the instruction on page 9 of the instructions given by the Court, as follows, to wit:

“You are instructed that while under the laws of Alaska in force prior to August 30th, 1913, it was not actually necessary to post a notice of location upon a placer mining claim, nor even to record the location notice, yet it was the custom to do either or both of these acts. Where the location notice was recorded the legal effect of it was to give constructive notice of the location to all persons, and where the notice was posted on the ground, it was for the purpose of aiding in ascertaining the boundaries of the claim, but failure to post any notice on the ground or even to record the location notice did not render the location void.”

On the ground that the same incorrectly states the law in this, to wit: When a locator posts a notice of location on his claim the notice becomes a part of the markings on the ground to enable a subsequent prospector to trace the boundaries of the claim, and when the notice posted on the ground described the claim as running in a certain direction and the recorded notice describes it as running in the opposite direction, the notice posted on the ground controls. And upon this issue the Court should have given instruction number 3 asked by plaintiff and the latter part

of instruction number 4 asked by plaintiff.

## VII

Plaintiff excepts to the first paragraph of the Court's instruction given on page 10, which reads as follows, to wit:

"You are instructed that a record of a mining location authorized by law is constructive evidence to all parties of the contents of such record, and if you find from the evidence that the location notice of the defendant Purdy was duly recorded in the office of the recorder of White River precinct and recording district of Alaska prior to the time of the alleged location by the plaintiff Sutherland, then the plaintiff Sutherland is conclusively deemed to have notice of such location, whether he has actually examined the recorded notice or not."

On the ground that the same is a legal abstraction not applicable to the facts of this case, for the reason that the notice posted on the ground by the alleged attorney for defendant Purdy describes the claim as running 1320 feet upstream and this notice was a part of the markings on the ground by which the boundaries of the claim were to be traced, and the recorded notice referred to in said instruction [298] describes the claim as extending 1320 feet downstream. There being a direct conflict in the two descriptions the one posted on the ground prevails.

## VIII.

Plaintiff excepts to the second instruction given on page 11 of the Court's instruction, as follows, to wit:

“You are instructed that while posted or recorded notices are an aid in determining the boundaries of a claim and the position of the monuments which mark such boundaries, yet it is the boundaries as marked on the ground by proper stakes or monuments which really define the limits of the location, and if a difference exists between the descriptions given in the notice as posted on the ground and the stakes or other monuments established thereon, then the monuments govern and control and are to be considered as correctly indicating the tract of ground included within the location of such mining claim.”

On the ground that the same incorrectly states the law in this: The rule that monuments control in real estate boundaries is subject to the limitation that they approximate courses and distances, and if they are widely at variance with the location of the land as indicated by the courses and distances in the description, then they are to be disregarded. In this case the location notice posted on the ground described the claim as running upstream and entirely outside the land in controversy.

### IX.

Plaintiff excepts to the first question submitted to the jury for a special finding thereon, on the ground that there was no legal evidence offered at the trial in any manner establishing that any power whatever was executed by the defendant Purdy authorizing G. L. Gates to locate for said defendant placer mining claims in Alaska, and on the further ground that

such a power of attorney would be valueless for the purpose stated unless it was recorded in some recording office of the Third Judicial Division of Alaska prior to the first step taken in location by virtue of its authority.

X.

Plaintiff excepts to the second question submitted to the jury for a special finding thereon on the ground that the same is uncertain, indefinite and incomplete [299] and insufficient to elicit an answer applicable to any issue in the case, for the reason that it fails to state the requirement of law that stakes or monuments on the ground must be sufficient to indicate the boundaries of a claim so that the same can be readily traced upon the ground.

T. J. DONOHUE and

E. E. RITCHIE,

Attorneys for Plaintiff.

Service of copy admitted this 6th day of April, 1914.

M. D. LEEHEY and

J. J. FINNEGAN,

Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 6, 1914. Arthur Lang, Clerk. By K. L. Monahan, Deputy.  
[300]



*In the District Court for the Territory of Alaska,  
Third Division.*

No. C—73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Verdict.**

We, the jury duly empaneled and sworn in the above-entitled action, do find for the defendant.

E. A. HEGG,

Foreman.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 3, 1914. Arthur Lang, Clerk. By K. L. Monahan, Deputy.

Entered Court Journal No. C—2, page No. 222.

[301]

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**Answer to Special Findings.**

I.

Did the defendant Purdy execute and deliver to G. L. Gates a power of attorney in writing prior to July 6th, 1913, authorizing Gates to locate placer claims for Purdy in Alaska, and was the same duly acknowledged and thereafter recorded with the recorder of the White River Recording District of Alaska?

Answer: Yes.

E. A. HEGG,

Foreman.

## II.

Was the placer mining claim designated as No. 2 Below Discovery on Big Eldorado Creek in the White River Recording District of Alaska staked on the ground and its boundaries sufficiently marked by stakes or monuments at the time of the alleged location of such claim on the behalf of the defendant Purdy?

Answer: Yes.

E. A. HEGG,  
Foreman.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 3, 1914. Arthur Lang, Clerk. By K. L. Monahan, Deputy.

Entered Court Journal No. C—2, page No. 223.  
[302]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C—73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Motion for a New Trial.**

NOW COMES the plaintiff by his attorneys, O. A. Tucker, T. J. Donohoe and E. E. Ritchie, and moves the Court to set aside the verdict returned by the jury in this action and to grant a new trial of this cause upon the following grounds:

## I.

That the evidence was insufficient to justify the verdict in this: That the defendant wholly failed to establish that the alleged Power of Attorney from defendant Purdy to G. L. Gates, concerning which testimony was admitted by the Court, was a duly executed Power of Attorney authorizing Gates to locate placer mining claims for Purdy in Alaska.

That said verdict is against law in this: it is admitted in evidence by the defendant that no Power of Attorney from Purdy to Gates was filed for record until after the attempted location of the mining claim in question, and after the filing of the Location Notice of the same; and the evidence failed to show that the alleged Power of Attorney testified to by witnesses for defendant was the same as that filed for record; and the alleged Power of Attorney shown by the record of the Recorder's office introduced in evidence totally fails to show that it is a Power of Attorney or that it confers any authority upon Gates.

## II.

Errors in law occurring at the trial and excepted to by plaintiff at the time, as follows, to wit:

1. The Court erred in admitting evidence over the objection of plaintiff of an alleged Power of Attorney not pleaded by [303] defendant, and in admitting evidence of an alleged defect in a public record, to wit, the Record of the White River Recording Precinct, when an impeachment of the record had not been pleaded.

2. The Court erred in ruling that defendant had made a sufficient showing of the existence of the

alleged missing Power of Attorney and of diligence to produce it at the trial.

3. The Court erred in its instructions given to the Jury, and in refusing to give certain instructions asked by plaintiff, to which instructions and refusals to instruct plaintiff has filed exceptions in writing herein, which exceptions plaintiff hereby refers to and adopts as part of this Motion.

Dated this 6th day of April, 1914, at Cordova, Alaska.

O. A. TUCKER,  
T. J. DONOHOE and  
E. E. RITCHIE,  
Attorneys for Plaintiff.

Service of copy admitted this 6th day of April, 1914.

M. D. LEEHEY,  
J. J. FINNEGAN,  
Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 6, 1914. Arthur Lang, Clerk. By K. L. Monahan, Deputy. [304]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.



**Order Denying Motion for New Trial.**

This cause came on before the Court this 10th day of April, 1914, upon the motion of plaintiff for an order setting aside the verdict heretofore returned herein in favor of the defendant and against the plaintiff, and to grant a new trial in the action. The motion was submitted without argument, and after consideration thereof the Court directed that an order be entered denying the same. To which ruling and order of the Court the plaintiff by his counsel then and there excepted and the exception was by the Court allowed.

Done at Cordova, Alaska, April 10, 1914.

FRED M. BROWN,

Judge.

[Endorsed]: Entered Court Journal No. C-2, Page 244. Filed in the District Court, Territory of Alaska, Third Division. Apr. 10, 1911. Arthur Lang, Clerk. By K. L. Monahan, Deputy. [305]

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*In the District Court for the Territory of Alaska,  
Third Division.*

C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

### **Judgment.**

This cause came regularly on for trial in open court on March 31st, 1914, and the plaintiff was present in person and represented by Messrs. T. J. Donohoe and E. E. Ritchie, as counsel, and the defendant was present in person and represented by Maurice D. Leehey, and J. J. Finnegan, as counsel, and a jury of twelve men was duly empaneled and sworn to try this cause, and testimony was introduced on behalf of the plaintiff and on behalf of the defendant, and the proceedings continued from day to day until the testimony was concluded by the parties, and the case was then argued to the jury by counsel for the respective parties, and the jury was instructed by the Court and thereupon retired to consider for their verdict.

And thereafter the jury returned into court and gave their verdict in writing, which was duly entitled in this court and cause, was signed by the foreman of said jury and in its behalf and read as follows: "We, the jury duly empaneled and sworn in the above-entitled action, do find for the defendant. E. A. Hegg, Foreman."

Thereupon each juror answered in open court that the same was his verdict and such verdict was thereupon filed and duly entered herein, and the same was found by the Court to be in due form and to have been regularly given and made, and that the defendant is entitled to judgment thereon against the plaintiff in accordance with said verdict, and the Court further finds from the testimony and verdict and as

a matter of law that the defendant is entitled to have entered herein the decree of this [306] Court quieting the title of said defendant to the placer mining claim designated as No. 2 Below Discovery on Big Eldorado Creek in the White River Recording District of Alaska as against all claims of the plaintiff:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff, Dan D. Sutherland, take nothing by this action, and that his complaint be dismissed, and further, that the defendant, F. W. Purdy, have judgment against said plaintiff, Dan D. Sutherland, for his costs herein, to be taxed by the clerk.

IT IS FURTHER ADJUDGED AND DECREED that the said defendant, F. W. Purdy, is the owner and entitled to the sole possession of the placer mining claim designated as No. 2 Below Discovery on Big Eldorado Creek, a tributary of Wilson Creek, which latter is a tributary of the Chisana River in the White River Recording District of Alaska, and that the attempted location of any portion of the ground included therein by the plaintiff as the Surprise Fraction placer mining claim was and is wholly void, and is hereby so declared and held for naught, and the said plaintiff, Dan D. Sutherland, and all persons claiming through or under him or in any manner through or under his attempted location of the said Surprise Fraction placer mining claim are and each of them is hereby permanently and forever enjoined and restrained from in any manner asserting title to or claiming posses-

sion of any ground included in the said placer mining claim designated as No. 2 Below Discovery on Big Eldorado Creek, and from in any manner interfering with or disturbing the defendant and his heirs and assigns, in the possession, use or enjoyment thereof.

Done in open court and signed and ordered entered herein on this tenth day of April, A. D. 1914.

FRED M. BROWN,  
Judge.

Attest: ARTHUR LANG, Clerk.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 10, 1914. Arthur Lang, Clerk.

Entered Court Journal No. C-2, page No. 239.  
[307]

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**[Plaintiff's Exhibit "B"—Notice of Placer Mine Location.]**

**NOTICE OF PLACER MINE LOCATION.**

Plaintiff's Exhibit "B."

C-73.

Notice is hereby given that the undersigned, a citizen of the United States, over twenty-one years of age, has, on this 30 day of August, 1913, located a placer mining claim, of 191½ acres, more or less, situated in the White River mining district in the Territory of Alaska, and more particularly described as follows, to wit:

Commencing at this initial monument and running down stream 1300 feet by 330 ft. on each side



of this monument, claim to be known as Surprise Fraction, situated between A. F. Nelson's No. 2 below Big Eldorado claim, and R. Bell No. 3 below, claim beginning at this initial monument and running 1300 ft. down stream northwesterly to center end and 330 ft. on each side of monument, corners marked by four willow posts, and that I intend to hold and work the same according to the laws and local rules and regulations.

Date of Discovery—Aug. 30.

Date of Location—Aug. 30.

DAN SUTHERLAND,

Locator.

Witnesses: JACK J. FORD. [308]

**Plaintiff's Exhibit "C"—in C-73 (Certificate of Location).**

Plaintiff's Exhibit "C," in C-73.

**CERTIFICATE OF LOCATION.**

THIS IS TO CERTIFY, that the undersigned, a qualified entryman *un* the laws of the United States has located and does hereby claim the following described placer mining claim, to wit:

The name of the claim is Surprise Fraction. The names of the locator or locators is (xxx) Dan. Sutherland.

The dates of *Discover* and the posting of the location notice are August 30 and August 30, A. D. 1913, respectively. Said claim is 1300 feet long and 660 feet wide. Said claim is located in the White River or Cathenda Mining District, Territory of Alaska,

on the Big Eldorado creek, which is a tributary to and near to Wilson Creek, and is further bounded by monuments, posts and corners, as follows, to wit: Commencing at the initial Stake and running thence 330 feet northerly to Stake No. 1; thence 1300 feet westerly to Stake No. 2; thence 330 feet southerly to lower center end; thence 330 feet southerly to Stake No. 3; thence 1300 feet easterly to Stake No. 4; thence 330 feet northerly to place of beginning. This claim is situated between A. F. Nelson's No. 2 below Discovery, and Richard Bell's No. 3 below on Discovery on said Big Eldorado Creek.

Location work has been done and performed on said claim equivalent to one hundred dollars at the rate of wages prevalent in the mining above named for the same kind of work, and the said work is described as follows, to wit:

The construction of a cut 2 feet deep,  $21\frac{1}{2}$  feet wide and 45 feet long. Said cut is in the creek bottom about 75 ~~feet~~ from the initial monument, downstream. Also another cut in the bank on the right limit of said creek about 125 feet from the initial monument 18 feet long; averaging 4 feet deep and  $41\frac{1}{2}$  feet wide. Said work was done and performed at the instance and under the direction of affiant for the purpose of improving the said claim in compliance to the laws regulating the location of mining claims in Alaska.

Dated Sept. 18, A. D. 1913. [309]

DAN SUTHERLAND,

Locator.

Subscribed and sworn to *before this* 7th day of October, 1913.

[Seal]

J. J. FINNEGAN,  
Notary Public for Alaska.

My commission expires Aug. 19, 1917.

[Endorsed]: "Filed for record October 7th, 1913, at 10:45 A. M., by Dan Sutherland, and recorded in Vol. 6, page 250, Records of White River Precinct, Alaska. H. E. Morgan, Recorder. By J. J. Finnegan, Deputy." [3!0]

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[Defendant's Exhibit No. 1—Telegram, Gates to Purdy.]

INDENT. DEFTS. 1.

UNITED STATES SIGNAL CORPS.

Time Filed 5:30 P. M. 10 words pd. \$1.30.

Cordova, Alaska, March 27, 1914.

Frank W. Purdy,

Forty Mile, Y. T.,

via Ft. Egbert, Alaska.

Have you the power attorney you gave me last May.

G. L. GATES.

Answer c/o Hotel Windsor, Cordova.

Defendant's Exhibit No. 1, C-73. [311]

**[Defendant's Exhibit No. 2—Telegram, Purdy to  
Gates.]**

18

**SIGNAL CORPS, UNITED STATES ARMY  
TELEGRAM.**

Received at Cordova, Alaska.

22 V. K. R. 10 Via Eagle.

Forty Mile, Y. T., Mar. 28, 1914.

G. L. Gates,

Cordova, Alaska.

You have it delivered to you day leaving here  
positive.

**FRANK W. PURDY.**

4—14 P.

Defendant's Exhibit No. 2, C—73. [312]

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**[Certificate of Clerk U. S. District Court to Copy of  
Defendant's Exhibit No. 3.]**

United States of America,

Territory of Alaska,

Third Division.—ss.

I, the undersigned Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the attached is a full, true and correct copy of the original pages No. 278, 279 and 280, Record Book No. 1 of the Records of the White River Precinct, Third Judicial Division, Territory of Alaska, as the same appears on file and of record in my office.

In Testimony Whereof, I have subscribed **my**



name and affixed the seal of the said Court of Valdez, Alaska, this 31st day of March, 1914.

[Seal]

ARTHUR LANG,  
Clerk.

By K. L. Monahan,  
Deputy.

Defendant's Exhibit No. 3, Cause No. C.-73.

**[Defendant's Exhibit No. 3—Excerpts from Records  
of White River Precinct.]**

278

July 21, 1913.

Power Attorneys.

Fred C. Thompson to Mrs. H. E. Morgan.

1 Sworn to June 12, 1913, before G. C. Cole.

Am *counsul* Dawson, Y. T. Witnessed  
by H. E. Morgan.

Recorded by above at 9:45 A. M. July 21,  
1913.

(Sgn.) H. E. MORGAN,  
Rec.

By H. H. Waller.

Thomas Clair to Dan Ryan.

2 Sworn to July 16th, 1913, before H. E.  
Morgan.

Notary Public at Canyon City, Y. T.

Recorded July 21, 1913, at 9:50 A. M.

(Sgn.) H. E. MORGAN,  
Rec.

By H. H. Waller.

Dep.

July 26, 1913.

E. Mullett to John Murtaugh.

Taken at Little Eldorado, before H. E. Morgan, Commissioner and Notary Public,

3 On July 26, 1913.

Recorded at 6 P. M. July 26, 1913.

(Sgn.) H. E. MORGAN,

Rec.

By H. H. Waller.

Dep. [313]

July 26, 1913.

280

279

C Frederick Lambert to Joseph P. McLellan.

July 14, 1913—Witnessed by R. Wiley.

4 Filed for record at 20 M. past 5 P. M.  
July 26, 1913.Sworn to before A. M. Taylor, July 14,  
1914, at Canyon City, Y. T.

(Sgn.) H. E. MORGAN,

H. H. Waller.

Deputy.

July 21.

Fred C. Thompson to Mrs. H. E. Morgan.

July June 12, 1913, before G. C. Cole Am.  
Con.

5. Dawson, Y. T. Witnessed by H. E. Morgan.

Recorded by above on July 21, 1913, 9:45  
A. M.

(Sgn.) H. E. MORGAN,

H. H. Waller,

Dep.

1.80

Skelton M. Co.  
H. E. Morgan.

S. K. M. Co.

July 21.

Thomas Clair to Dan Ryan.

- 6 Sworn to July 16th, 1913, before H. E. Morgan ~~Commissioner~~.

Recorded July 21, 1913.

(Sgn.) H. E. MORGAN,  
Com.  
H. H. Waller,  
Dep.

July 28, 1913.

Maurice D. Leehey to R. W. Wiley.

Sworn to before B. A. Northrup, at Seattle, June 18, 1913.

7. Recorded 3:35 P. M. July 28, 1913.

(Sgn.) H. E. MORGAN,  
H. H. Waller,  
Dep. [314]

SKM Co.

282

280

July 28, 1913.

John Rosene of Seattle, Wash. to R. W. Wiley of Portland, Ore.

Sworn to before Luella Ayers, June 24th,

8. 1913.

Recorded at 40 M. past 3 P. M. July 28, 1913.

(Sgn.) H. E. MORGAN,  
H. H. Waller,  
Dep.

Skm. Co.

1.80

July 29, 1913.

Frank W. Purdy to G. L. Gates,

Sworn to before R. McDonald of Forty Mile, Y. T.

Jas. McLeod

9 May 31st, 1913.

Recorded at 55 M. past 6 A. M. July 29, 1913.

By request W. E. McKinney.

(Sgn.) H. E. MORGAN,

H. H. Waller,

Dep.

July 29, 1913.

C. L. Hale to W. Meder.

Sworn to before H. J. Watkins, July 21, 1913, at Kennecott, Alaska.

10 Recorded by above at 8 M. past 6 P. M. July 29, 1913.

(Sgn.) H. E. MORGAN,

H. H. Waller,

July 29, 1913.

Carl Engstrom to W. Meder.

Sworn to before H. J. Watkins, July 21, 1913, at Kennecott, Alaska.

11 Recorded by above at 12 M. past 6 P. M. July 29, '13.

(Sgn.) H. E. MORGAN,

H. H. Waller,

Dep. [315]

**[Defendant's Exhibit No. 4—Record of Location by  
Gates for Purdy.]**

Eldorado Cr. No. 2 Below Dis. Dis. & Loc. July  
C 6th, 1913, by G. L. Gates, Attorney for  
D F. W. Purdy, Principal.

27 Commencing at this initial post, situate  
at lower center end of No. 1, Below Dis. Eldorado



Cr. and running downstream 1320 ft., together with 330 ft. on both sides. This claim is located on Eldorado Cr., tributary Wilson Cr.

Recorded by request W. E. McKinney at 7 P. M. July 27, '13.

[Seal]

(Sgn.) H. E. MORGAN,

By H. H. W.

Defendant's Exhibit 4, C—73. [316]

United States of America,  
Territory of Alaska,—ss.

I, the undersigned, United States Commissioner and Ex-officio Recorder for the White River Precinct, Third Judicial Division of the Territory of Alaska, do hereby certify that the foregoing and hereto attached one sheet bears and is a full, true and correct copy of a certain instrument recorded in Vol. 1, page 31 of the records of the above-named precinct, in my care and custody on this date.

In witness whereof I have hereunto set my hand and official seal this 6th day of January, 1914.

[Notarial Seal.] ANTHONY J. DIMOND,  
U. S. Commissioner and Ex-officio Recorder. [317]

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**[Certificate of Clerk U. S. District Court to  
Defendant's Exhibit No. 5.]**

United States of America,  
Territory of Alaska,  
Third Division,—ss.

I, the undersigned Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the attached is a full, true and correct

copy of the original Order Creating the White River Precinct, Third Division, Ter. of Alaska, as the same appears on file and of record in my office.

In testimony whereof, I have subscribed my name and affixed the seal of the said Court at Valdez, Alaska, this 2d day of April, 1914.

[Court Seal]

ARTHUR LANG,  
Clerk.

By K. L. Monahan,  
Deputy.

Defendant's Exhibit #5, No. C-73.

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**[Defendant's Exhibit No. 5—Order Establishing  
the White River Precinct, etc.]**

*In the District Court for the Territory of Alaska,  
Third Division.*

In the Matter of Creating a New Recording Precinct,  
to be Known as THE WHITE RIVER RE-  
CORDING PRECINCT, in the Third Judi-  
cial Division, Alaska.

**ORDER.**

It appearing to the Court that a necessity exists for the establishment of a new recording district, to include a part of the Copper Center Recording Precinct and the Chitina Recording Precinct, in the northeastern portion of the Third Judicial Division, Territory of Alaska, covering the White River and its tributaries to the divide on Scolai Pass, Euchre Mountain, Shushana (or Chisana) River, Snag River and Beaver River and its tributaries,—

NOW, THEREFORE, IT IS ORDERED that the said District shall be known as the White River Recording Precinct and shall begin at a point on the boundary line between Alaska and the Yukon District, Canada, at Mt. Wood; thence north along said boundary line between Alaska and the Yukon District, Canada, to a point at the intersection of the line dividing the Third and Fourth Judicial Divisions of Alaska; thence along said division line between the Third and Fourth Judicial Divisions of Alaska in a westerly direction to a point where the Tanana River crosses said line; thence in a southerly line along the watershed dividing the Nabesna and its tributaries on the west and the rivers flowing into the Tanana River on the east of said watershed; thence to Regal Mt; thence in a southeasterly direction to Scolai Pass; thence in a southeasterly direction to the point of beginning, Mt. Wood.

AND IT IS FURTHER ORDERED that the boundaries of the said Copper Center Recording Precinct and the said [318] Chitina Recording Precinct are hereby changed to conform to this order.

Done at Cordova, Alaska, this 7th day of May, 1913.

PETER D. OVERFIELD,  
District Judge.

Entered Court Journal No. C—2, Page No. 93.

Special April, 1913, Term, May 8th—25th Court Day—Thursday. [319]

**[Certificate of Clerk U. S. District Court to  
Defendant's Exhibit No. 6.]**

Defendant's Exhibit #6, C-73.

United States of America,  
Territory of Alaska,  
Third Division,—ss.

I, the undersigned Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the attached is a full, true and correct copy of the original Affidavit of Annual Labor found in Volume 6 of the Records of the White River Precinct, Ter. of Alaska, 3d Div., page 154, as the same appears on file and of record in my office.

In Testimony Whereof, I have subscribed my name and affixed the seal of the said Court at Valdez, Alaska, this 2d day of April, 1914.

[Seal]

ARTHUR LANG,  
Clerk.

By K. L. Monahan,  
Deputy.

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**[Defendant's Exhibit No. 6—Affidavit of Annual  
Labor.]**

United States of America,  
Territory of Alaska,—ss.

On this 6th day of September, 1913, before me, the subscriber, personally appeared W. E. McKinney, who being first duly sworn on oath, saith: That he is one of the owners of and is familiar with the following described placer mining claims situate in the White River Precinct and Recording District, Terri-



tory of Alaska, to wit: Claims No. 4, 5 and 6 on Little Eldorado, Claims 1, 2 and 3 Below on Big Eldorado, 2 Above on Glacier Creek and 1 Below on Glacier Creek; that during the year ending December 31, 1913, at least \$100 worth of labor and improvements was performed and made upon each of said claims; that work on No. 4 on Little Eldorado consisted of a drain 80' long, 3' deep, 21½' wide; on No. 5 it consisted of two drains one 50' long, 3' wide and 3' deep and the other 30' long, 3' deep and 21½' wide; on No. 6 it consisted of an open cut 30' long, 41½' deep and 4' wide, and a side-hill cut, and a drain 30' long and 2' deep; that on No. 1 Below Discovery on Big Eldorado it consisted of a bedrock drain 75' long, 3' deep and wide; on No. 2 Below Discovery it consisted of an open cut 40' long, 41½' deep and wide; on No. 3 Below Discovery it consisted of a drain 50' long, 21½' wide and 3' deep, also an open cut 20' long, and 5' deep; that on 2 Above on Glacier it consisted of a drain 100' long, 3' deep and wide; that on No. 1 Below on Glacier it consisted of *and* open cut 10' deep, 20' long and 20' wide; that on each of said claims other general mining work was done in addition to that above specified. That this affiant was assisted in the above work by A. P. Schultze, Alex Timewell, Miles Atkinson and Sidney Johnson.

W. E. McKINNEY. [320]

*In the District Court for the Territory of Alaska,  
Third Division.* L

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Order [Extending Time to October 15, 1914, to File  
Bill of Exceptions, etc.]**

On motion of plaintiff for an order of this Court extending the time in which plaintiff may prepare, settle and file his bill of exceptions to be used on a writ of error from the judgment of this court to the United States Circuit Court of Appeals for the Ninth Circuit, and to fix the amount of the cost bond on said writ of error or appeal,

IT IS HEREBY ORDERED that said plaintiff shall have to and including the 15th day of October, 1914, in which to prepare, settle and file his bill of exceptions.

IT IS FURTHER ORDERED that the cost bond of plaintiff in the matter of said appeal or writ of error be, and the same is hereby, fixed at the sum of five hundred (\$500.00) dollars, the sureties of said bond to be approved by the clerk of this court in case the Judge of this court is absent from Valdez, Alaska, when said bond is presented for filing.

Done in open court at Cordova, Alaska, this 10th day of April, 1914.

FRED M. BROWN,  
Judge.

OK.—MAURICE D. LEEHEY,  
E. E. RITCHIE.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 10, 1914. Arthur Lang, Clerk.

Entered Court Journal No. C-2, page No. 240.  
[322]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Order Enlarging Time to Settle and File Bill of  
Exceptions.**

On this 15th day of October, 1914, at Seward, Alaska, came the plaintiff in the above-entitled action by his attorneys, T. J. Donohoe, O. A. Tucker and E. E. Ritchie, and stated to the Court that the record of this cause heretofore prepared in Valdez as the bill of exceptions on writ of error discloses certain omissions necessary to be supplied to complete the record on writ of error; and it appearing to the Court that said omissions can be supplied and

corrected only by reference to the court reporter's shorthand notes of the trial and the journal of the trial of this cause at Cordova, at the March, 1914, term of this court, which notes and journal are now in the clerk's office of this court at Valdez; and this being the last day of the time heretofore granted by order of this court within which plaintiff may settle and file his bill of exceptions herein;

Now, therefore, for good cause shown it is ordered by the Court here, that plaintiff may have until and including November 14, 1914, to prepare, settle and file his bill of exceptions on appeal in this case.

Dated at Seward, Alaska, October 15, 1914.

FRED M. BROWN,  
Judge.

Filed in the District Court, Territory of Alaska,  
Third Division. Oct. 15, 1914. Arthur Lang, Clerk.  
By T. P. Geraghty, Deputy.

Entered in S-1 page No. 320. [323]

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*In the District Court for the Territory of Alaska,  
Third Division.*

C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Order Settling Bill of Exceptions.**

It is hereby ordered that the foregoing bill of ex-



ceptions, consisting of the order giving leave to plaintiff to file his amended complaint and permitting defendant's amended answer to stand as his answer to the amended complaint, the amended complaint, amended answer, motion requiring defendant to make his amended answer more definite and certain, order requiring defendant to make his amended answer more definite and certain, demurrer to amended answer, minute order overruling demurrer to amended answer, reply, reporter's transcript of record of the trial including the instructions of the Court to the jury, and stipulation by counsel for both sides in open court in the presence of the jury before they retired to deliberate upon their verdict, which stipulation was then and there agreed to by the Court in the presence of the jury, plaintiff's exceptions in writing to the instructions of the Court to the jury pursuant to stipulation, defendant's request for special findings, verdict, answers to questions set out in request for special findings, motion for new trial, order denying motion for new trial, judgment, order extending to October 15, 1914, the time within which plaintiff might settle and file his bill of exceptions, order extending to November 14, 1914, the time within which plaintiff might settle and file his bill of exceptions, Plaintiff's Exhibits "A," "B" and "C," Defendant's Exhibits 1, 2, 3, 4, 5 and 6.

Done in open court at Valdez Alaska, this 14th day of November, 1914.

FRED M. BROWN,  
Judge.

[Endorsed as follows]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 14, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 406. [324]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

### **Assignment of Errors.**

Now comes the plaintiff in the above-entitled cause and files the following assignment of errors upon which he will rely in his prosecution of a writ in said cause:

#### **I.**

The Court erred in overruling plaintiff's demurrer to the affirmative defense of defendant's amended answer.

#### **II.**

The Court erred in refusing to give to the jury the following instruction asked by plaintiff, to which refusal plaintiff duly excepted and the exception was allowed:

"You are instructed that in this case the burden of proof is upon the plaintiff to establish that he made a legal location of a placer mining claim upon the ground in controversy, which is

a placer mining claim on Big Eldorado Creek, in the White River recording precinct, Territory of Alaska, which plaintiff located under the name of 'Surprise Fraction.' It is incumbent upon the plaintiff to show that he performed all the acts required by law to initiate and complete a placer location; and I further instruct you that the evidence in this case does establish, and the defendant admits, that plaintiff performed all the acts necessary to make a valid location of a placer claim, dating from August 30, 1913, the date of his mineral discovery thereon.

"It is further necessary for plaintiff to show that after making such location he expended upon the claim the value of one hundred dollars in labor or improvements within ninety days, in order to continue to hold the claim. This is admitted by the defendant and therefore is a proven fact in the case.

"You are further instructed that after the plaintiff has shown that he has done all the acts necessary to make a valid location of a placer mining claim, as he has done in this case, the burden then devolves upon the defendant to show by his evidence that he made a valid location of the ground in controversy, by performing all the acts required by law to complete such location, beginning with a discovery of mineral on the date claimed by him, July 6, 1913, or some other date prior to the first step in location made by the plaintiff.

“Defendant claims that on July 6, 1913, he made location of a placer mining claim on Big Eldorado Creek and called it No. 2 Below Discovery. It is admitted by the pleadings and shown by the evidence on both sides that the ground so claimed is the same tract that is claimed by the plaintiff under the name [325] ‘Surprise Fraction.’ The defendant does not claim that he made this location personally, but he does claim that it was made for him and in his name by one G. L. Gates, who, defendant claims, held a power of attorney from defendant empowering said Gates to make such location for him.

“At the time defendant claims to have located this ground through Gates as his attorney in fact, the law governing such locations in Alaska required such power of attorney to be in writing, signed and acknowledged by the principal, and recorded in some recording precinct in the judicial division wherein the mining claim was situated—in this case the Third Division—and such record of the power of attorney was required to be prior in date to the first act of location by the attorney in fact. The attorney might then proceed to make a location by performing all and each of the acts necessary for that purpose, to wit: he must make a *bona fide* discovery of placer gold within the exterior boundaries of the claim as afterward located; he must put upon the ground in a conspicuous place a notice of location describing the claim,



then mark the boundaries so that the lines might be readily traced; that is, he must so describe his claim and mark the boundaries that a later prospector, or any other person of ordinary intelligence might go upon the ground and by following the description contained in the notice of location so posted trace the exterior boundaries from post to post as erected by the locator."

### III.

The Court erred in refusing to give to the jury the following instruction asked by the plaintiff, to which refusal the plaintiff duly excepted and the exception was duly allowed:

"It is admitted by both parties that the notice of location posted upon the claim by the defendant through his alleged attorney in fact, Gates, claims 1320 feet running upstream and 330 feet on each side, but it is contended by the plaintiff the notice of location so posted upon the ground was placed upon the upper end of the ground in controversy, or at the lower end of the claim marked on Plaintiff's Exhibit "A" as No. 2 Below. If you believe from the evidence that the notice was so placed then I instruct you that the description as contained in the notice of location did not cover the land in controversy, and that at the time the plaintiff went upon the ground covered by the 'Surprise Fraction' the same was unappropriated ground so far as defendant's location was concerned and you must find for the plaintiff.

“On the other hand, it is claimed by the defendant that the location notice was originally placed at the lower end of the claim and therefore the description covers the land in controversy. It is testified by W. E. McKinney that the notice was originally posted at the lower end of the claim, and it is testified by other witnesses that after the plaintiff made his location the said McKinney moved the notice of location from the upper end of the claim to the lower end of the claim. The plaintiff by way of rebuttal on this point has introduced in evidence a certified copy of defendant’s notice of location recorded at the request of the said W. E. McKinney, which describes the claim of defendant as running 1320 feet downstream. In arriving at your conclusion as to where the notice was originally posted you should take into consideration all the evidence offered before you both by the plaintiff and the defendant concerning monuments or lack of monuments, the likelihood of the notice of location being removed, the manner in which and places where other location notices were posted upon adjoining claims located on or about the same day, and you should carefully review and weigh together all the facts and circumstances in evidence in determining in your own minds whether the defendant’s notice of location was originally posted at the upper end or at the lower end of the ground in controversy, and in that connection you may take into consideration the certified copy of defendant’s notice of location which appears upon the rec-

ords of the recording district, and introduced here in evidence." [326]

## IV.

The Court erred in refusing to give to the jury the following instruction asked by plaintiff, to which refusal plaintiff duly excepted and the exception was duly allowed:

"I instruct you that where there is a difference in the description of a mining claim between the notice actually posted on the ground and the notice of location as recorded the notice posted on the ground controls, and as it is admitted in this case that the notice actually posted upon the ground describes the mining claim as running 1320 feet upstream, it controls as to the description of the claim; therefore you will not consider the certified copy of the location notice as recorded other than as it may assist you in reaching a conclusion as to which end of the claim in controversy the notice of location was originally posted upon."

## V.

The Court erred in refusing to give to the jury the following instruction asked by the plaintiff, to which refusal plaintiff duly excepted and the exception was duly allowed:

"You are instructed that unless you believe from the evidence that G. L. Gates was, at the time he claims to have made the location of the ground in controversy, acting under a power of attorney authorizing him to locate placer mining claims for the defendant, F. W. Purdy, and

that said power of attorney was in writing, duly acknowledged and delivered to Gates and in his possession at the time he made the location of the ground in controversy, you must find for the plaintiff.

“I further instruct you that if you do believe that Gates was so authorized, you must further believe from the evidence that he made a *bona fide* discovery of placer gold upon the ground embraced within the boundaries of the claim as located, and that he posted a notice of location in a conspicuous place upon the ground, describing the claim in controversy, and that he marked the boundaries thereof by substantial monuments or posts and referred to such monuments or posts in his notice of location so that another person by reading the notice of location and guided by the monuments or posts could readily trace out the boundaries of the claim.”

## VI.

The Court erred in refusing to give to the jury the following instruction asked by the plaintiff, to which refusal plaintiff duly excepted and the exception was duly allowed:

“You are instructed that if you believe from the evidence that the notice of location posted by the defendant on the claim was originally posted at the upper end of the claim or ground in controversy, then it did not describe the ground in controversy in this action, and you must find for the plaintiff.”

## VII.

The Court erred in refusing to give to the jury the



following instruction asked by the plaintiff, to which refusal plaintiff duly excepted and the exception was duly allowed:

“You are instructed that under the law governing placer location in Alaska prior to July 30, 1913, it was necessary [327] for the locator to expend upon the ground one hundred dollars in labor and improvements within the calendar year in which the location was made, in order to continue his right to hold the claim beyond the calendar year. As the defendant claims to have made his location prior to July 30, 1913, it was necessary for him to do this \$100 worth of work or improvement before the end of the year 1913, and unless you are satisfied that he did this he is not entitled to recover in this action.”

#### VIII.

The Court erred in refusing to give to the jury the following instruction asked by the plaintiff, to which refusal plaintiff duly excepted and the exception was duly allowed:

“At the time defendant claims to have located this ground as a placer mining claim through Gates as his attorney in fact the law governing such locations in Alaska required such a power of attorney to be in writing, signed and acknowledged by the principal, and recorded in some recording precinct in the judicial division wherein the mining claim was situated—in this case the Third Division—and such record of the power of attorney was required to be made be-

fore the first act in location was taken by the attorney in fact."

### IX.

The Court erred in refusing to give to the jury the following instruction asked by the plaintiff, to which refusal plaintiff duly excepted and the exception was duly allowed:

"You are instructed that the established rules of evidence and an express statute of the territory of Alaska provide that if the weaker and less satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

Under this rule of oral evidence is offered of the contents of a written instrument alleged to be missing, and admitted by the Court upon a showing of the party as to the circumstances of its disappearance, the jury are the judges of the weight to be given to such oral testimony as to the contents of the alleged written instrument, and may draw their own inferences concerning the failure to produce the original."

### X.

The Court erred in refusing to give to the jury the following instruction asked by the plaintiff, to which refusal plaintiff duly excepted and the exception was duly allowed:

"I instruct you that under the evidence offered in this case it is for you to determine whether or not at the date of the location of the placer claim as set up by defendant, G. L. Gates had a power of attorney in writing, duly ac-

knowledge, from the defendant, F. W. Purdy, authorizing the said Gates to locate placer mining claims in the territory of Alaska. And unless you so find that Gates did have such a power of attorney at the time he claims to have located the ground in controversy in this action you the plaintiff."

## XI.

The Court erred in refusing to give to the jury the following instruction asked by the plaintiff, to which refusal plaintiff duly excepted and the exception was duly allowed: [328]

"I instruct you that the defendant has pleaded in his answer that the power of attorney under which G. L. Gates claims to have acted as attorney in fact for the defendant in the location of the placer ground in controversy in this action was duly recorded on July 29, 1913, at page 280 in Volume 1 of the records of White River precinct of the Territory of Alaska. The record referred to is in words and figures as follows:

" 'July 29, 1913. Frank W. Purdy to G. L. Gates. Sworn to before R. McDonald of Forty Mile, May 31st, 1913. Jas. McLeod. Recorded at 55 M. past 6 A. M. July 29, 1913. By request W. F. McKinney (Sgn.) H. F. Morgan. H. H. Waller, Dep.'

"I further instruct you that this record is not a record of such a power of attorney as was required by law at the time defendant claims that Gates located the mining ground in controversy so as to authorize the said Gates to locate placer

mining ground in the Territory of Alaska for the defendant; and it is for you to determine from all the evidence whether or not the said Gates at the time claimed, presented, or caused to be presented for record in White River precinct a power of attorney in writing duly acknowledged by said defendant authorizing said Gates to locate for defendant placer mining ground in the Territory of Alaska.”

## XII.

The Court erred in giving the following instruction to the jury, to which instruction plaintiff duly excepted and the exception was duly allowed:

“The defendant claims to have made a location through Gates as his attorney in fact, on July 6th, 1913, on which day he claims to have made a discovery of valuable mineral, marked the boundaries of his claim so that the same could be readily traced and on July 27, 1913, filed his location certificate with the recorder of White River precinct, and on the 29th day of July, 1913, claims to have filed the power of attorney from the defendant Purdy to Gates with the said recorder.”

“If you find from the evidence that these acts were done at the times and in the manner testified to by the defendant and his witnesses, then your verdict should be for the defendant.”

## XIII.

The Court erred in giving the following instruction to the jury, to which instruction plaintiff duly excepted and the exception was duly allowed:



“On July 6th, 1913, at the time defendant claims to have made his location, the law in Alaska did not require that the locator should post a notice of location on the claim, or that he should even file the notice of location with the recorder, but that he may do either or both of these acts, but the location is not invalid by reason of failure to do either or because there is a mistake in the calls or courses or distances given in either a notice posted on the ground or a notice filed for record.”

#### XIV.

The Court erred in giving the following instructions to the jury, to which instruction plaintiff duly excepted and the exception was duly allowed:

“You are instructed that such power of attorney need not be recorded prior to the first step taken in making the location, and if you believe from the evidence in this case that the defendant Purdy executed a power of attorney in writing to G. L. Gates prior [329] to July 6th, 1913, and that the same was duly acknowledged, and that on July 29th, 1913, said power of attorney was given to the recorder for the White River precinct of Alaska for record and the recording fees paid then the defendant sufficiently complied with the law in that regard.”

#### XV.

The Court erred in giving the following instruction to the jury, to which instruction plaintiff duly excepted and the exception was duly allowed:

“You are instructed that if you find from a fair preponderance of the evidence that the de-

fendant Purdy executed a power of attorney in writing authorizing the said Gates to locate placer mining claims for said Purdy in Alaska, and that the same was duly acknowledged, and recorded in White River recording district, and if you further find from a fair preponderance of the evidence that the boundaries of the placer claim No. 2 Below Discovery on Eldorado creek were sufficiently marked on the ground, then you should disregard any errors in the notice posted on the claim, and your verdict should be for the defendant."

#### XVI.

The Court erred in giving the following instruction to the jury, to which instruction plaintiff duly excepted and the exception was duly allowed:

"You are instructed that while under the laws of Alaska in force prior to August 30th, 1913, it was not actually necessary to post a notice of location upon a placer mining claim, nor even to record the location notice, yet it was the custom to do either or both of these acts. Where the location notice was recorded the legal effect of it was to give constructive notice of the location to all persons and where the notice was posted on the ground it was for the purpose of aiding in ascertaining the boundaries of the claim, but failure to post any notice on the ground or even to record the location notice did not render the location void."

#### XVII.

The Court erred in giving the following instruc-

tion to the jury, to which instruction plaintiff duly excepted and the exception was duly allowed:

“You are instructed that a record of a mining location authorized by law is constructive evidence to all parties of the contents of such record, and if you find from the evidence that the location notice of the defendant Purdy was duly recorded in the office of the recorder of White River precinct and recording district of Alaska prior to the time of the alleged location by the plaintiff Sutherland, then the plaintiff Sutherland is conclusively deemed to have notice of such location, whether he has actually examined the recorded notice or not.”

#### XVIII.

The Court erred in giving the following instruction to the jury, to which instruction plaintiff duly excepted and the exception was duly allowed:

“You are instructed that while posted or recorded notices are an aid in determining the boundaries of a claim and [330] the position of the monuments which mark such boundaries, yet it is the boundaries as marked on the ground by proper stakes or monuments which really define the limits of the location, and if a difference exists between the descriptions given in the notice as posted on the ground and stakes or other monuments established thereon, then the monuments govern and control and are to be considered as correctly indicating the tract of ground included within the location of such mining claim.”

## XIX.

The Court erred in submitting to the jury the first question of defendant's request for special findings, to which question the plaintiff duly excepted and his exception was duly allowed.

## XX.

The Court erred in submitting to the jury the second question of defendant's request for special findings, to which question the plaintiff duly excepted and exception was duly allowed.

## XXI.

The Court erred in refusing to permit J. J. Ford, a witness called to testify in behalf of plaintiff, to testify to markings and descriptions on boundary posts of adjoining locations of mining claims for the purpose of showing that defendant's notice of location of the Surprise Fraction, comprising the ground in controversy in this action, does not include any part of said ground and does cover other ground, to which ruling of the Court plaintiff then and there excepted and the exception was allowed.

## XXII.

The Court erred in admitting parol testimony to vary the terms of a written instrument, to wit, the power of attorney under which defendant's alleged attorney in fact, G. L. Gates, claimed authority to locate the ground in controversy herein, it being pleaded in defendant's answer that Gates' authority to locate said ground was contained in a power of attorney appearing of record in the records of White River [331] precinct, wherein said ground is sit-



uated; said testimony being in substance as follows, to wit:

a. The witness, G. L. Gates, being called to testify on behalf of defendant, was permitted to testify over the objection of plaintiff that he had lost or misplaced a power of attorney given him by defendant, duly signed and acknowledged in Yukon territory; that said power of attorney was the authorization under which he had located the ground in controversy in this action, and was the same power of attorney which was filed for record with the recorder of White River precinct, and which said recorder purported to record. To the admission of all of which testimony plaintiff then and there excepted and the exception was by the Court duly allowed.

b. The witness, W. E. McKinney, being called upon to testify on behalf of defendant, was permitted to testify over the objection of plaintiff that he was a witness to the execution of the power of attorney from defendant Purdy to Gates described by the witness Gates; that said power of attorney authorized said Gates to locate placer mining claims in Alaska; that Gates had given said power of attorney to said witness McKinney to file for record with the recorder of White River Precinct, and that he had so filed the same for record, on the 29th day of July, 1913. To all of which testimony plaintiff then and there objected and the objection was by the Court duly allowed.

### XXIII.

The Court erred in denying plaintiff's motion for a new trial.

## XXIV.

The Court erred in entering judgment herein in favor of defendant and against plaintiff.

## XXV.

The Court erred in entering a decree in favor of defendant and against the plaintiff granting a perpetual injunction against plaintiff enjoining and restraining him from asserting title to the land in controversy, this being an action of ejectment brought by plaintiff, and neither defendant's [332] amended answer nor his proof presenting to the Court any ground or basis for equitable relief.

WHEREFORE plaintiff prays that the judgment of the District Court of Alaska, Third Division, may be reversed.

O. A. TUCKER,  
T. J. DONOHOE and  
E. E. RITCHIE,

Attorneys for Plaintiff and Plaintiff in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Nov. 14, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [333]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Petition for Writ of Error.**

Now comes the plaintiff and says: That on the 10th day of April, A. D. 1914, the above-entitled court made and entered its judgment herein, in favor of defendant and against the plaintiff, ordering and adjudging that the plaintiff take nothing by its cause of action, and that his complaint be dismissed, and that the defendant have judgment against him for costs; and further adjudging and decreeing that the defendant is the owner and entitled to the sole possession of the mining property described in said judgment and that the plaintiff has no interest therein.

That in said judgment and in the proceedings had prior thereto, certain errors were committed to the prejudice of the plaintiff, all of which more fully appears in the assignment of errors filed with this petition.

WHEREFORE plaintiff prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the errors so complained of, and that the transcript of the record, testimony, proceedings and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals, for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may be proper therein.

O. A. TUCKER,  
T. J. DONOHUE and  
E. E. RITCHIE,  
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 14, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [334]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Order Allowing Writ of Error.**

On this 5th day of March, A. D. 1915, comes Dan D. Sutherland, the above-named plaintiff and plaintiff in error herein, by his attorneys of record. And the said plaintiff and plaintiff in error by his said attorneys of record filed herein and presented to the court his petition praying for the allowance of a writ of error, and praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit. And at the same time and place said plaintiff presented and filed herein his assignment of errors intended to be urged by him.

Now, therefore, in consideration of the premises, and the court being fully advised in the premises, it is



ORDERED, that the aforesaid writ of error be and the same hereby is allowed upon the said plaintiff's giving bond according to law in the sum of five hundred dollars for the costs of appeal and upon said said writ of error.

IT IS FURTHER ORDERED that a transcript of the record and proceedings and papers in the cause, duly authenticated, be sent to the United States Circuit Court of Appeals [335] for the Ninth Circuit.

Dated at Valdez, Alaska, this 5th day of March, A. D. 1915.

FRED M. BROWN,  
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 8, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered court Journal No. 9, page No. 2. [336]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, that we, Dan D. Sutherland, as principal, and Anton

Carlson and H. T. Whitley, as sureties, are held and firmly bound to F. W. Purdy, respondent, upon this writ of error, and to his heirs and assigns, in the sum of five hundred dollars (\$500.00), lawful money of the United States, to be paid to the aforesaid F. W. Purdy, his heirs and assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Dated this 6th day of March, 1915.

WHEREAS, Dan D. Sutherland, the above-named plaintiff, lately at a session of the District Court for the Territory of Alaska, Third Division, in said court, between Dan D. Sutherland, plaintiff, and F. W. Purdy, defendant, judgment was rendered against said plaintiff and in favor of said defendant, and the said plaintiff, Dan D. Sutherland, having obtained from said Court an order allowing a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered in the aforesaid action, and a citation, directed to said defendant, F. W. Purdy, is about to be issued, citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in San Francisco, California.

Now, the condition of the above obligation is such that if the said plaintiff, Dan D. Sutherland, above-named, shall prosecute his said writ of error to effect, and shall answer all damages and costs that may be awarded against him, if he fails to make his

plea good, then this obligation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 6th day of March, A. D. 1915.

DAN D. SUTHERLAND, [Seal]  
Principal.

By T. J. DONOHUE, [Seal]  
His Attorney of Record.

ANTON CARLSON, [Seal]  
Surety.

H. T. WHITLEY, [Seal]  
Surety.

The sufficiency of the sureties on the foregoing bond and the bond itself is approved this 8th day of March, A. D. 1915.

FRED M. BROWN,  
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 8, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,  
Plaintiff,

vs.

F. W. PURDY,  
Defendant.

**Writ of Error [Original].**

The President of the United States of America, to the Honorable FRED. M. BROWN, Judge of the District Court for the Territory of Alaska, Third Division, Greeting:

Because in the record and proceedings, as also in the rendition of judgment, which is in the District Court before you, between Dan D. Sutherland, the original plaintiff and plaintiff in error, and F. W. Purdy, the original defendant and defendant in error, manifest error hath happened, to the damage of said Dan D. Sutherland, the plaintiff in error, as is said and appears by the petition herein:

We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that you under your seal, distinctly and openly, send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, together with this writ, so as to have the same at said place in said Circuit on the 7th day of April, 1915, that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of [339] right, and according to the laws and customs of the United States should be done.



WITNESS, The Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the 8th day of March, in the year of our Lord one thousand nine hundred and fifteen.

[Seal]

ARTHUR LANG,  
Clerk.

Allowed by:

FRED M. BROWN,  
Presiding Judge in the District Court for the Territory and District of Alaska, Third Division.

Filed in the District Court, Territory of Alaska, Third Division. Mar. 8, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page No. 1. [340]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Writ of Error (Copy).**

The President of the United States of America, to the Honorable FRED. M. BROWN, Judge of the District Court for the Territory of Alaska, Third Division, Greeting:

Because in the record and proceedings, as also in the rendition of judgment, which is in the District Court before you, between Dan D. Sutherland, the

original plaintiff and plaintiff in error, and F. W. Purdy, the original defendant and defendant in error, manifest error hath happened, to the damage of said Dan D. Sutherland, the plaintiff in error, as is said and appears by the petition herein:

We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that you under your seal, distinctly and openly, send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, together with this writ, so as to have the same at said place in said Circuit on the 7th day of April, 1915, that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of [341] right, and according to the laws and customs of the United States should be done.

WITNESS, The Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the 8th day of March, in the year of our Lord one thousand nine hundred and fifteen.

[Clerk Seal]

ARTHUR LANG,  
Clerk.

Allowed by:

FRED M. BROWN,  
Presiding Judge in the District Court for the Territory and District of Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 8, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page No. 1. [342]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Citation on Writ of Error [Original].**

The United States of America,—ss.

**The United States of America**, to F. W. Purdy and to Maurice D. Leehey, His Attorney of Record, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Third Division, wherein Dan D. Sutherland, the above-named plaintiff, is appellant, and you are respondent and appellee, to show cause, if any, there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 8th day of March, in the year of our Lord, one thousand nine hundred and fifteen.

FRED M. BROWN,  
Judge of the District Court for the Territory of  
Alaska, Third Division.

[Seal]

Attest: ARTHUR LANG,  
Clerk.

Filed in the District Court, Territory of Alaska,  
Third Division. Mar. 8, 1915. Arthur Lang, Clerk.  
By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page No. 2. [343]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Citation on Writ of Error [Copy].**

The United States of America,—ss.

The United States of America, to F. W. Purdy and  
to Maurice D. Leehey, His Attorney of Record,  
Greeting:

You are hereby cited and admonished to be and  
appear at the United States Circuit Court of Ap-  
peals for the Ninth Circuit, to be held at the City of



San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Third Division, wherein Dan D. Sutherland, the above-named plaintiff, is appellant, and you are respondent and appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 8th day of March, in the year of our Lord, one thousand nine hundred and fifteen.

FRED M. BROWN,

Judge of the District Court for the Territory of  
Alaska, Third Division.

[Official Seal]      Attest: ARTHUR LANG,  
Clerk.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. March 8, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Journal No. 9, page No. 2. [344]

*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Acceptance of Service of Papers on Writ of Error  
by Clerk of Court.**

United States of America,  
Territory of Alaska,—ss.

T. J. Donohoe, being first duly sworn, deposes and says: I am one of the attorneys of record for the above-named plaintiff; that the above-named defendant does not reside in Valdez, Cordova, or Seward, Alaska, those being the three places in which the above-named court holds terms of court in the Third Division of the Territory of Alaska; that the place of residence of the above-named defendant is unknown to the above-named plaintiff or to his attorneys of record; that I am informed and believe that said defendant resides somewhere in Yukon Territory, Canada; that I am well acquainted with Maurice D. Leehey and J. J. Finnegan, the only persons who were ever attorneys of record for the above-named defendant; that on the 14th day of April, 1914, the said J. J. Finnegan withdrew as attorney of record for said defendant, and on that date a minute order was made and entered in the journal of the

above-entitled court, under the direction of the Court, noting such withdrawal; that the said Maurice D. Leehey is now, and since said 14th day of April, 1914, has been the only attorney of record for said defendant; that said Maurice D. Leehey resides in the State of Washington and is not now in the Territory of Alaska; that it is impossible for the plaintiff or his attorneys [345] to make service of any papers in connection with this writ of error upon the defendant or his attorney of record within the time allowed by law in which to file this writ of error in the Circuit Court of Appeals; that the defendant and his attorney of record, being nonresidents of any of the places of holding terms of the above-named court in the Third Division of the Territory of Alaska, have failed to comply with the provisions of Rule 17 of the rules of the above-named court, now in force and effect, in this, that they and each of them have failed to designate a place in any of such places of holding court where notices and copies may be served upon them.

T. J. DONOHOE.

Subscribed and sworn to before me this 8th day of March, 1915.

[Notarial Seal]      ANTHONY J. DIMOND,  
Notary Public for Alaska.

My commission expires Mar. 18, 1917.

**“RULE 17. SERVICE UPON PARTY OR NON-RESIDENT ATTORNEY.**

In all cases where a party commences or appears in an action or proceeding in person, or by an attorney not a resident of the place of holding court,

or who has not an office therein, he shall endorse on his complaint or other pleading, a designation of the place in such place of holding court, where notices and copies may be served on him; and if he fails to so designate, then the deposit of such notice or copy for him in the clerk's office shall be sufficient service."

I, Arthur Lang, Clerk of the above-entitled court, hereby certify that the above and foregoing is Rule 17 of the rules of the District Court for the Territory of Alaska, Third Division, and of the whole thereof, adopted by said Court on the 31st day of December, 1902, and that said rule has ever since been and now is in full force and effect.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Valdez, Alaska, this 8th day of March, 1915.

[Seal of District Court.]      ARTHUR LANG,  
Clerk of the District Court for the Territory of  
Alaska, Third Division.      [346]

United States of America,  
Territory of Alaska,—ss.

THIS IS TO CERTIFY, that I, Arthur Lang, Clerk of the above-entitled court, pursuant to the provisions of Rule 17 governing the procedure and practice of said court, have this day been served with, and received for and on behalf of the above-named defendant and his attorney of record, true and correct copies of the assignment of errors, petition for writ of error, order allowing writ of error, bond for cost on writ of error, writ of error, and citation on writ of error.



IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the above-entitled court this 8th day of March, A. D. 1915.

[Seal of District Court.]      ARTHUR LANG,  
Clerk of the District Court for the Territory of  
Alaska, Third Division.

[Endorsed]: Filed in the District Court for the  
Territory of Alaska, Third Division. March 8, 1915.  
Arthur Lang, Clerk. By T. P. Geraghty, Deputy.  
[347]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

**Praecipe for Transcript.**

To the Clerk of the Above-entitled Court:

You will please make, certify and transmit forthwith to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, at San Francisco, a copy of the record in the above-entitled cause as a return to the writ of error heretofore sued out of said Circuit Court of Appeals to review the Judgment in said cause, consisting of the following named files and records and proceedings in said cause, to wit:

1. Order giving leave to plaintiff to file his amended complaint and permitting defendant's amended answer to stand as his answer to the amended complaint.
2. Amended complaint.
3. Amended answer.
4. Motion requiring defendant to make his amended answer more definite and certain.
5. Order requiring defendant to make his amended answer more definite and certain.
6. Demurrer to amended answer.
7. Minute order overruling demurrer to amended answer.
8. Reply.
9. Reporter's transcript of record of the trial, including the instructions of the Court to the jury, and stipulation by counsel for both sides in open court in the presence of the jury before they retired to deliberate upon their verdict, which stipulation was then and there agreed to by the Court in the presence of the jury.
10. Plaintiff's exceptions in writing to the [347½] instructions of the Court to the jury pursuant to stipulation.
11. Defendant's request for special findings.
12. Verdict.
13. Answers to questions set out in request for special findings.
14. Motion for new trial.
15. Order denying motion for new trial.
16. Judgment.

17. Order extending time to and including October 15, 1914, in which plaintiff might prepare, settle and file his bill of exceptions.
18. Order extending time to and including November 14, 1914, within which plaintiff might prepare, settle and file his bill of exceptions.
19. Plaintiff's Exhibits "B" and "C."
20. Defendant's Exhibits 1, 2, 3, 4, 5 and 6.
21. Order settling and allowing bill of exceptions.
22. Assignment of errors.
23. Petition for writ of error.
24. Order allowing writ of error.
25. Bond for cost on writ of error.
26. Writ of error and copy thereof.
27. Citation on writ of error and copy thereof.
28. Acceptance of service of papers on writ of error by clerk of court.
29. This praecipe.

T. J. DONOHOE and  
E. E. RITCHIE,

Attorneys for Plaintiff and Plaintiff in Error.

Filed in the District Court, Territory of Alaska,  
Third Division. Mar. 8, 1915. Arthur Lang, Clerk.  
By T. P. Geraghty, Deputy. [348]

[Certificate of Clerk U. S. District Court to  
Transcript of Record.]

*In the District Court for the Territory of Alaska,  
Third Division.*

No. C-73.

DAN D. SUTHERLAND,

Plaintiff,

vs.

F. W. PURDY,

Defendant.

United States of America,  
Territory of Alaska,  
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the above and foregoing and hereto annexed 348 pages, numbered from 1 to 348, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause, as the same appears of record and on file in my office.

That this transcript is made in accordance with the plaintiff's and appellant's praecipe on file herein.

I further certify that the foregoing transcript has been prepared, examined and certified to by me, and that the cost of such preparation, examination and certificate, amounting to \$34.20, was paid to me by T. J. Donohoe and E. E. Ritchie, attorneys for the plaintiff and plaintiff in error, Dan D. Sutherland.

IN WITNESS WHEREOF, I have hereunto set



my hand and affixed the seal of this court at Valdez,  
Alaska, this 8th day of March, A. D. 1915.

[Seal] ARTHUR LANG,  
Clerk of the District Court for the Territory of  
Alaska, Third Division. [349]

[Endorsed]: No. 2583. United States Circuit Court of Appeals for the Ninth Circuit. Dan D. Sutherland, Plaintiff in Error, vs. F. W. Purdy, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filed March 18, 1915.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.



No. 2583

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

DAN D. SUTHERLAND,

*Plaintiff in Error,*

VS.

F. W. PURDY,

*Defendant in Error.*

## OPENING BRIEF FOR PLAINTIFF IN ERROR.

T. C. WEST,

T. J. DONOHUE,

E. E. RITCHIE,

O. A. TUCKER,

*Attorneys for Plaintiff in Error.*

Filed this.....day of December, 1915.

FRANK D. MONCKTON, Clerk.

By.....  
F. D. Monckton,  
Deputy Clerk.





No. 2583

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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DAN D. SUTHERLAND,

*Plaintiff in Error,*

VS.

F. W. PURDY,

*Defendant in Error.*

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## OPENING BRIEF FOR PLAINTIFF IN ERROR.

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### Statement of the Case.

This action is based upon rival assertions of right to a mining claim in the Chisana, or Sushanna, district of Alaska. Plaintiff in error was plaintiff in the trial court and defendant in error was defendant. They will be referred to in this brief as in the court below.

On July 6, 1913, one G. L. Gates, claiming to act as attorney in fact for defendant, F. W. Purdy, located the disputed ground in Purdy's name by the usual method of posting discovery notice and marking boundaries. Thereafter, on July 27, 1913, one McKinney filed for record a notice of said claimed location by Gates for Purdy, in the office

of the recorder of said White River precinct, wherein said mining claim is situated. It is claimed by defendant that Gates had a power of attorney in writing from Purdy. In his amended answer defendant pleads that "said power of attorney was duly recorded by Gates on July 29, 1913, at page 280 of volume 1 of the records of said White River precinct". The record of said power of attorney appears as follows:

"July 29, 1913

Frank W. Purdy to G. L. Gates

Sworn to before R. McDonald of Forty Mile  
May 31st 1913

JAS. McLEOD

Recorded at 55 M. past 6 AM July 29, 1913—

By request of W. E. McKinney.

(Sgn) H. E. MORGAN

H. H. WALLER Dep."

It is not claimed by the defendant that any other power of attorney was ever recorded by or for him in the Third Judicial Division of Alaska, wherein said claim is situated. At the trial defendant did not produce any power of attorney but Gates testified that he had misplaced the one given him by Purdy. Over the objection of plaintiff the court allowed Gates and other witnesses to testify to the contents of the alleged missing document.

Plaintiff located the disputed ground on August 30, 1913, claiming the same as unoccupied public land. He pleaded and testified that he complied

with the requirements of law in all particulars in making the location.

It is admitted that the location notice posted on the ground called for a claim running 1320 feet up Big Eldorado creek. The notice recorded called for a claim running down stream. Plaintiff and other witnesses testified that the posted notice was originally on the upper end of the claim but was afterward moved to the lower end. Defendant's witnesses testified that it was originally placed at the lower end. If so it described the ground in controversy. If plaintiff's contention was true the notice did not describe the ground in controversy, but a tract of similar size beginning at its upper end.

At the time defendant's location was made by power of attorney the congressional act of August 1, 1912, was in force, as it still is, containing the following requirement as to locations by power of attorney:

"That no person shall hereafter locate any placer mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Any person so authorized may locate placer-mining claims for not more than two individuals or one association under such power of attorney, but no such agent or attorney shall be authorized or permitted to locate more than two placer-mining claims for any one principal or association during any calendar month, and no

placer-mining claim shall hereafter be located in Alaska except under the limitations of this act.”

Plaintiff contended that the plain meaning of the act requires such a power of attorney to be of record before location. Defendant contended that it was only necessary to record the power of attorney before a location by another person. The Court upheld defendant's contention. The case was tried before a jury, which returned a general verdict and special findings in favor of defendant. After plaintiff's motion for a new trial had been denied the court entered judgment in favor of defendant, and plaintiff sued out this writ of error.

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### **Assignment of Errors.**

Plaintiff assigns the following errors upon which he relies in prosecuting this writ:

#### **I.**

The court erred in overruling plaintiff's demurrer to the affirmative defense of defendant's amended answer.

#### **II.**

The court erred in refusing to permit J. J. Ford, a witness called to testify in behalf of plaintiff, to testify to markings and descriptions on boundary posts of adjoining locations of mining claims for the purpose of showing that defendant's notice



of location of the Surprise Fraction, comprising the ground in controversy in this action, does not include any part of said ground and does cover other ground, to which ruling of the court plaintiff then and there excepted and the exception was allowed.

### III.

The court erred in admitting parol testimony to vary the terms of a written instrument, to wit, the power of attorney under which defendant's alleged attorney in fact, G. L. Gates, claimed authority to locate the ground in controversy herein, it being pleaded in defendant's answer that Gates' authority to locate said ground was contained in a power of attorney appearing of record in the records of White River precinct, wherein said ground is situated; said testimony being in substance as follows, to wit:

(a) The witness G. L. Gates, being called to testify on behalf of defendant, was permitted to testify over the objection of plaintiff that he had lost or misplaced a power of attorney given him by defendant, duly signed and acknowledged in Yukon territory; that said power of attorney was the authorization under which he had located the ground in controversy in this action, and was the same power of attorney which was filed for record with the recorder of White River precinct, and which said recorder purported to record. To the admission of all of which testimony plaintiff then

and there excepted and the exception was by the court duly allowed.

(b) The witness W. E. McKinney, being called upon to testify on behalf of defendant, was permitted to testify over the objection of plaintiff that he was a witness to the execution of the power of attorney from defendant Purdy to Gates, described by the witness Gates; that said power of attorney authorized said Gates to locate placer mining claims in Alaska; that Gates had given said power of attorney to said witness McKinney to file for record with the recorder of White River precinct, and that he had so filed the same for record, on the 29th day of July, 1913. To all of which testimony plaintiff then and there objected and the objection was by the court duly allowed.

#### IV.

The court erred in denying plaintiff's motion for a new trial.

#### V.

The court erred in entering judgment herein in favor of defendant and against plaintiff.

#### VI.

The court erred in entering a decree in favor of defendant and against the plaintiff granting a perpetual injunction against plaintiff enjoining and restraining him from asserting title to the land in controversy, this being an action of ejectment brought by plaintiff, and neither defendant's

amended answer nor his proof presenting to the court any ground or basis for equitable relief.

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### Argument.

Plaintiff's argument can be most logically and concisely stated by arranging it under the two contentions following:

First. The court erred in repeated rulings that the law of 1912 does not require a power of attorney authorizing a mineral location in Alaska to be recorded before a location is made under it.

Second. The court erred in admitting parol testimony to show the contents of an alleged power of attorney when the record of a so-called power of attorney under which the attorney claimed to act was pleaded in defendant's answer and the precinct recorder's record of the same was in evidence. Further, the evidence of loss of the document was insufficient to lay a foundation for admission of parol testimony.

In support of these contentions counsel for plaintiff respectfully urge the following:

**FIRST. THE COURT ERRED IN REPEATED RULINGS THAT THE LAW OF 1912 DOES NOT REQUIRE A POWER OF ATTORNEY AUTHORIZING A MINERAL LOCATION IN ALASKA TO BE RECORDED BEFORE A LOCATION IS MADE UNDER IT.**

Plaintiff first raised the objection that defendant's location was invalid by demurring to the af-

firmative defense of the amended answer, which set up the defendant's acts of location, including the filing of the alleged power of attorney twenty-three days after the first act of location. The demurrer was overruled by the court. Plaintiff next objected to the introduction of any testimony in support of said affirmative defense, on the same ground (T. of R. 128). This objection was overruled. The same contention was raised in special instructions asked and refused and in exceptions to instructions given.

It appears to counsel for plaintiff in error that no citation of authority will aid this court in deciding. It is simply a question of the meaning of language contained in a statute enacted for a certain purpose. That language appears to counsel for plaintiff to be so clear as to leave no room for interpretation, and therefore the rules for interpretation of statutes have no application. For emphasis the words of the statute particularly involved are here repeated:

“No person shall hereafter locate any placer mining claim in Alaska *unless* he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office of the judicial division where the location is made. *Any person so authorized may locate*”, etc.

In this case it is admitted that the alleged power of attorney from Purdy to Gates was not filed for record until more than twenty days after the purported location under it. Defendant contended, and the trial court ruled, that filing the



power of attorney before any rival claim intervened was a sufficient compliance with the law.

Plaintiff contended, and here contends, that such a construction, or more accurately, such a warping of the plain language of the law avoids one of its main objects. It will not be denied that the chief purpose of the law was to prevent wholesale grabbing of placer ground in new camps. It is conceded that mining law, following general opinion based on experience in mining camps, upholds as matter of public policy the doctrine that the discoverer of a new camp is entitled to enough ground to compensate him for his discovery, but that it is also against public policy and natural right that he should be permitted to monopolize vast areas for speculation. This is an evil which has caused almost limitless litigation and quarrels and more or less bloodshed in many mining camps. It has been a plague which found opportunity largely in the privilege of unlimited locations by power of attorney. To abolish the evil, at the request of almost the whole territory of Alaska, Congress passed the law limiting the number of placer locations by one individual either for himself or for others.

Plaintiff affirms that the requirement that powers of attorney be recorded was a requirement of a showing of good faith and actual authority which logically should precede the acts of location. Otherwise a man might locate four claims each month for acquaintances and obtain powers of attorney

afterward, antedating the instruments. It is needless to suggest to the court that accommodating notaries can be found in all countries who will date an instrument back if sufficiently induced, and usually the inducement need not be great.

Plaintiff urges that proof that it was the intention of Congress in passing the law of 1912 at the behest of Alaska miners, to require among other things the recording of the power of attorney prior to any act of location based upon it, is found in similar laws enacted by two Alaska legislatures soon afterward. Less than nine months after Congress passed the law in question, and before this litigation arose, the first Alaska legislature enacted the following:

“An act to supplement the mining laws of the United States in their application to the Territory of Alaska;”

“Section 1. That no person shall hereafter locate any mining claim in the Territory of Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, which shall be witnessed by two witnesses but need not be acknowledged, and recorded in the office of the recorder in whose precinct such location is made, *previous to the date of the initiation of such location.*”

Session Laws Alaska, 1913, p. 283.

The Alaska legislature of 1915 under the same title as the foregoing passed a law which contains the following:

“Section 6. That no power of attorney for the location of placer mining claims in Alaska

shall be valid or have any force or effect whatsoever, nor shall any location made thereunder be valid or have any force or effect unless such power of attorney be duly executed and acknowledged before an officer authorized to administer oaths, and recorded in the office of the recorder for the district in which such claim is located, *prior to the date of the filing for record of any location thereunder.*”

Session Laws Alaska, 1915, p. 14.

The territorial law of 1913 made specific the plain intent of the Congressional law of 1912. The territorial law of 1915 modified the requirement but still made necessary the filing of the power of attorney before filing record of location. The reason for this modification may be found in the strict requirement of boundary markings and monuments and filing certificate of location, much more drastic provisions than the federal law contains, the latter not requiring the filing of location notice at all. Filing power of attorney must still precede completion of location under it.

The object of requiring this prior showing of authority is to discourage wholesale locations. Most attorney locations are in reality for the prospector himself and are mere evasions of the intent of the law. So well is this understood that total abolition of attorney locations is widely advocated in Alaska.

In this case it is admitted by defendant's witnesses that he was never in Alaska from the alleged date of the alleged power of attorney to the time of

trial of the cause. It did not appear in evidence that he had ever interested himself in the disputed claim, a fact giving rise to suspicion that he was a "straw man" in the whole proceeding. Added to this is the fact that the alleged power of attorney was strangely mislaid. This brings the argument to another issue.

**SECOND. THE COURT ERRED IN ADMITTING PAROL TESTIMONY TO SHOW THE CONTENTS OF AN ALLEGED POWER OF ATTORNEY WHEN THE RECORD OF A SO-CALLED POWER OF ATTORNEY UNDER WHICH THE ATTORNEY CLAIMED TO ACT WAS PLEADED IN DEFENDANT'S ANSWER AND THE PRECINCT RECORDER'S RECORD OF THE SAME WAS IN EVIDENCE. FURTHER, THE EVIDENCE OF THE LOSS OF THE DOCUMENT WAS INSUFFICIENT TO LAY A FOUNDATION FOR ADMISSION OF PAROL TESTIMONY.**

The power of attorney pleaded is the following:

"July 29 1913

Frank W. Purdy to G. L. Gates

Sworn to before R. McDonald of Forty Mile  
May 31st 1913

JAS McLEOD

Recorded at 55 M. past 6 AM July 29 1913—

By request W. E. McKinney,

(Sgn) H. E. MORGAN

H. H. WALLER Dep."

The evidence admitted by the court sought to prove a power of attorney of which the foregoing was alleged to be an abstract. To avoid the force of the objection, and disarm the suspicion it aroused, defendant offered and the court admitted over plaintiff's objection, several pages of said volume 1 to show that for several days the recorder merely



recorded abstracts of powers of attorney instead of recording them in full. The whole book was afterward admitted in evidence, and showed that the recorder copied deeds and other instruments in full from the start as he afterward copied powers of attorney. It was stipulated by counsel not to cumber the record on appeal with a transcript of the whole book, as the purposes for which it was introduced are sufficiently shown by testimony and statements of counsel in the trial.

Plaintiff contended at the trial, and urges the contention now, that this queer record, coupled with the failure to produce the original power of attorney at the trial, raises a strong presumption, the almost irresistible conclusion, that the whole story of a power of attorney is a false pretense, that Purdy never gave a power of attorney to Gates; that when Gates and his associates wandered from Yukon territory into the White River district of Alaska they located everything that looked good to them, and in order to blanket the country extensively located numerous claims in the names of acquaintances, writing themselves as attorneys in fact. It is shown by the record that Gates, McKinney, Doyle and Nelson, witnesses for defendant, all located to the legal limit or nearly so, under alleged powers of attorney.

It seems strange that gentlemen who knew so much about the law of placer location by attorney did not make a better showing of authority in the recorder's books or at the trial. It seems likely

that they patched up the best showing they could after the fact. This presumption accounts also for the fact that the recorder for a few days made mere abstracts of powers of attorney on the record while copying all other documents in full. The recorder was aiding the conspiracy.

As defendant has seen fit to rely upon the last foregoing writing as a compliance with the law and has pleaded the book and page in which it appears of record, thereby relying upon this record and basing his rights to the mining claim in controversy upon it, plaintiff submits that he cannot go outside of what appears upon the record as he has pleaded it.

Plaintiff urges that the so-called power of attorney recorded on page 280 of Vol. 1 of the White River recording precinct, is not a power of attorney at all. It might be a deed, a bill of sale, or it might be a power of attorney to do and perform a thousand and one acts and still not be a power of attorney to locate a mining claim. Again whatever kind of an instrument it may be no one could say from reading it that it was "*duly acknowledged*".

"Acknowledgment as commonly used by the legislature, the courts, and the bar, means both the act and the written evidence thereof. An instrument is not duly acknowledged unless there is not only the oral acknowledgment but the written certificate also as required by the statutes regulating the subjects."

40 N. E. 75, 78.

It will be noticed that the so-called power of attorney does not even claim to be acknowledged. It states it was sworn to before R. McDonald of Forty Mile, but it does not state whether R. McDonald was authorized to administer oaths, it bears no evidence of a notarial seal, and wholly and utterly fails to comply with the requirements of the law of 1912. Therefore, as the record fails to show upon its face that it is a power of attorney from Purdy to Gates authorizing Gates to locate placer mining claims in Alaska for Purdy, and as it does not show that it is acknowledged as required by the law in question, it was wholly inadmissible in evidence in this case for any purpose whatever.

Defendant was not only bound by the recorded instrument because he pleaded it, but he was also precluded by the fact of record from showing by oral testimony that he had any other power because the recorded document was the only one which gave any notice to plaintiff and the rest of the world that Gates had from him a purported power of attorney. He should not have been permitted to introduce parol testimony because the plaintiff could not be bound by anything but the record. Further, a record of a deed is the best evidence of its contents next to the original deed itself. A public record of deeds has two objects: first to give notice to the world; second, to furnish a copy if the original be lost. When defendant claimed the original to be lost the best secondary evidence of its contents was the recorded copy of it.

“A public record which is in existence can be proven only by the production of the original, or by a certified copy made by the officer who is its proper custodian.”

Monk v. Carbin, 12 N. W. 571.

“Where the fact to be proved is one which the law requires to appear of record, the general rule is that the record itself or a properly authenticated copy is the best evidence, and parol evidence cannot be received to prove the fact except where the record is lost or destroyed or is for other reasons inaccessible, and a properly authenticated copy cannot be obtained.”

17 Cyc. 497, citing many cases.

In this case defendant pleaded an official record and the record was produced. He should have been compelled to stand on it. It is a case for application of the universal rule that the best evidence obtainable to prove any fact should be required. Record evidence is better than any person's recollection.

By the weight of authority defendant would be bound by the record even if he had not pleaded it. The record is the notice he has given to the world.

“A record is a constructive notice, only when, and so far as, it is a true copy. \* \* \* The test is a plain and simple one. It is, whether the record, if examined and read by the party dealing with the premises, would be an *actual* notice to him of the original instrument, and of all its parts and provisions. \* \* \* A record can only be a constructive notice, at most, of whatever is contained within itself.”

2 Pomeroy's Eq. Jur., Sec. 654.



“Whether subsequent purchasers of mortgages are charged with constructive notice of the contents of an instrument that has been filed for record in the recorder’s office, notwithstanding such instrument is afterwards incorrectly or improperly copied into books kept therefor, has been decided differently in different states; but it was held at an early day in this state, and must be regarded as a settled rule, that they have constructive notice of only such matters as appear from the instruments as copied into the proper books. In *Chamberlain v. Bell*, 7 Cal. 292, it was held that an instrument which was incorrectly transcribed by the recorder did not give constructive notice of its contents to a subsequent purchaser, but that such purchaser had the right to rely upon the instrument as it appeared upon the face of the record. In *Donald v. Beals*, 57 Cal. 399, the court said that, where there is a conflict between the actual record as it appears in the record book and the constructive record by the indorsement made upon the instrument at the time it was deposited for record the latter must give way to the former.

\* \* \* \* \*

The principle upon which the rule rests is that as, under the provisions of the recording act, if the grantee of an interest in lands would protect himself against subsequent purchasers or incumbrancers, he must give notice of his interest, and as the statute provides for constructive notice in the place of actual notice, it is incumbent upon him to comply with all the requirements prescribed for such constructive notice, one of which is the correct transcription of the instrument into the appropriate book. *Neslin v. Wells*, 104 U. S. 428, 26 L. Ed. 802; *Terrell v. Andrew Co.*, 44 Mo. 309. For this purpose the recorder is the agent of such grantee, and the errors or omissions

of the recorder in making such transcription are his errors or omissions in the same manner as are the errors of a sheriff in executing a writ, or of a clerk in recording an order or a judgment."

*Cady v. Purser*, 63 Pac. 845.

"Where the defendant bought the property in question and recorded his deed, but by mistake the number and description of the lots were omitted in the record, and plaintiff subsequently bought the same lots of the same grantor, and afterwards the common grantor of both procured the record of defendant's deed to be amended by interlineation of the description: *Held*, that the plaintiff had no notice of the previous conveyance of the property to defendant."

*Chamberlain v. Bell*, 2 Cal. 293.

"The negligence of the recorder in recording a conveyance in the wrong book cannot affect third persons, but the injury must fall on the parties to the conveyance."

\* \* \* \* \*

*Watkins v. Wilhoit*, 35 Pac. 646.

"A record of a mortgage indexed as 'Scandinavian Congregational Church, Trustees of', as grantors, is not constructive notice to a subsequent mortgagee taking a mortgage from the 'Scandinavian Free Church'."

*Cong. Church Bldg. Soc. v. Scand. Free Church of Tacoma*, 64 Pac. 750.

In *Neslin v. Wells-Fargo Company*, reported in 104 U. S. 802, the Supreme Court held that:

"A record of a deed in a book of mortgages does not convey the information required by statute and is, therefore, not effectual notice."

The so-called power of attorney as it appears of record was never entitled to be recorded for the reason that the statute requires that the power of attorney be duly acknowledged.

“The record of a deed filed in the office of a register of deeds, May 21, 1883, acknowledged before a notary public in this state, but not authenticated with his notarial seal, cannot be received in evidence under the provisions of Section 12, c. 87, Sess. Laws 1870; Section 387 a. Code, (Comp. Laws 1879).”

Meskimen v. Day, 10 Pac. 14.

In view of the above, it is respectfully submitted that the decision of the court below ought to be reversed.

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E. E. RITCHIE,

O. A. TUCKER,

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No. 2583.

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IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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DAN D. SUTHERLAND,  
*Plaintiff in Error,*

vs.

FRANK W. PURDY,  
*Defendant in Error.*

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Writ of Error to the District Court of the Territory  
of Alaska, Third Division.

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HON. FRED M. BROWN, *Judge.*

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BRIEF FOR DEFENDANT IN ERROR.

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IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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DAN SUTHERLAND,	}	No. 2583.
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Writ of Error to the District Court of the Territory  
of Alaska, Third Division.

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BRIEF FOR DEFENDANT IN ERROR.

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Counsel for defendant in error find it necessary to prepare this brief without yet having received the brief for the plaintiff in error. We do so, reserving the right to file a supplemental brief in answer to the brief of the plaintiff in error whenever filed. In this brief we must anticipate the argument of counsel for plaintiff in error from

the position taken upon the trial and the specifications in the Bill of Exceptions. We deem it well first to make the following

### STATEMENT OF FACTS.

The defendant Purdy resides at Forty Mile, Y. T., where he is employed by the Northern Commercial Company. On May 31st, 1913, his friend, George L. Gates, an old-time Alaska prospector, had received news of the Shushana strike in the White River region of Alaska, and was about to join the rush. Purdy provided him with funds, and executed a power of attorney authorizing Gates to locate mining claims in Alaska. This power of attorney was acknowledged and delivered Gates on the last day of May, when Gates and McKinney together left Forty Mile for Dawson en route to the White River country. At Dawson the certificate of the U. S. Consul as to the authority of the notary public at Forty Mile was attached to the power of attorney. (Record, pp. 138-9 and 160-163.) Gates and McKinney at Dawson joined Nels Nelson, one of the original Shushana discoverers, who had gone out for supplies, and together they proceeded to the Shushana diggings, arriving there on the evening of June 26th, 1913. (Record, p. 126.)



On July 6th, 1913, Gates made a discovery of placer gold upon the ground in controversy, and located the same as placer claim No. 2 Below Discovery, on Big Eldorado Creek, naming the defendant Purdy as locator. (Record, pp. 128-136.) The discovery is admitted, and all other acts of location are conceded regular, except that the power of attorney from Purdy to Gates was not recorded when the discovery was made and notice posted.

The Shushana diggings and the White River region of Alaska are north and east of the main Alaska Range, and for years were included in the Forty Mile Recording Precinct, with a recording office at Steel Creek, a short distance from the Yukon. Prospectors in the White River region continued to record their notices at Steel Creek as late as the summer of 1913, though as a matter of fact when the Fourth Judicial Division of Alaska was created in 1909 its boundaries were so fixed as to include Steel Creek and the recording office, but left the White River region in the Third Judicial Division. On May 13th, 1913, the White River Recording Precinct was created by order of court entered at Cordova on that day, and H. E. Morgan was appointed Recorder. Morgan was operating in the White River, but had left on a trip to

Dawson before news of his appointment reached him. When he heard in Dawson of his appointment he also had news of the Shushana strike, and decided to establish the recording office in the new diggings, but did not arrive there until about July 20th. The Purdy location notice and power of attorney to Gates were filed in his office for record, and fees paid, July 27th-29th. (Record pp. 215-7.) Morgan, however, had not yet received the blank books intended for the official records, so he used an ordinary journal in which he entered a brief summary or abstract of the documents filed with him for record. At the top of page 278 he wrote the heading "Powers of Attorney," and then numbered consecutively each power of attorney received. That from Purdy to Gate was No. 9, and the following record appears on page 280 of that book, which is designated as Volume 1 of the official records of the White River Recording District. (Record, pp. 267-274.)

"July 29, 1913.

9      Frank W. Purdy to G. L. Gates.  
Sworn to before R. McDonald, of Forty Mile,  
Y. T.

JAS. McLEOD.

May 31st, 1913.

Recorded at 55 M. past 6 A. M., July 29,  
1913.

By request W. E. McKinney.

H. E. MORGAN,

H. H. WALLER,

Dep."

The plaintiff Sutherland did not arrive in the Shushana until August 17th. He was not upon the ground in controversy until August 30th, when he made an attempted location of the same, with full knowledge of Purdy's location, but assuming the same to be invalid because the power of attorney was not recorded before discovery and posting of notice by Gates. (Record, pp. 87-90 and 105-7.)

Let us here refer to the decisions of Judge Brown, which we print in this brief. Appendix A is a copy of his decision *in re Likaits vs. Johnson*, and recites more fully the facts we have briefly reviewed as to the White River Recording District. It also states the views of the trial court as to the validity of a placer mining location under the so-called Wickersham Act of August 1, 1912, where the discovery and posting of notice occurs prior to the record of the power of attorney. Judge Brown there held the same valid when the record

was complete and all essential acts of location had been performed before the rights of others intervened. Appendix B is a copy of his decision in this case overruling plaintiff's objections to testimony as to the power of attorney from Purdy to Gates. It recites the facts as to the record of the power of attorney, states how the same was recorded, refers to the testimony showing the subsequent loss of the power of attorney, and permitted oral evidence of its contents to be introduced. That evidence satisfied the jury and resulted in a verdict for defendant. Counsel for the defendant in error now respectfully invite the attention of the court to these two decisions rendered by Judge Brown. The statements there made as to the facts will supplement this statement and give the Appellate Court a very accurate idea of the entire situation.

#### CONTENTIONS WHICH WE ASSUME WILL BE MADE BY PLAINTIFF IN ERROR.

We assume the plaintiff in error will contend that the trial court erred in the following particulars:

1. In holding that under the Act of Congress of August 1st, 1912 (Compiled Laws of



Alaska, Section 129b), it was not essential that the power of attorney from Purdy to Gates be recorded prior to the discovery and posting of notice, if such power of attorney was actually recorded, and all the acts of location fully completed before any rights of Sutherland intervened.

2. In holding that such power of attorney was actually recorded within the requirements of the law when filed for record with the proper recording officer, regardless of whether that officer afterwards made a complete copy of the same in his records or merely the abstract shown in this record.

We believe these are the two principal points involved in the consideration of this case. Other contentions may be made by plaintiff in error upon minor points, such as the sufficiency of the showing of diligence made by defendant in his efforts to produce the power of attorney at the trial. We shall but call attention to the fact that the defendant was denied the continuance he requested in order to produce a copy of the power of attorney, and also that the jury answered two special findings submitted by the court and found the facts to be as alleged by defendant. We shall address our argument in this brief to the two law

questions which we assume will form the principal contentions of the plaintiff in error.

## ARGUMENT UPON THE FIRST QUESTION.

The trial court held, and so instructed the jury, that if the power of attorney from Purdy to Gates was recorded, and all the essential acts of location otherwise fully completed, before the rights of Sutherland intervened, then the location of the defendant in error was valid, even though his power of attorney to Gates was not of record at the time of the discovery and marking of the boundaries. The views of the trial court on this point are fully expressed in the decision *in re Likaits vs. Johnson*, printed as Appendix A of this brief. That decision was rendered by Judge Brown after the question had been fully argued by the same counsel who appeared on the trial of this case. We have printed that decision in this brief, and make the same a part of the argument here for the defendant in error. It is therefore unnecessary to repeat the citation of authorities given in that decision. In substance, the defendant in error contends that under the Wickersham Act of August 1st, 1912, a location by power of attorney is valid if the power of attorney is recorded even after

discovery and staking, but before intervening rights of third parties. The Act provides (Compiled Laws of Alaska, 1913, p. 145):

“Sec. 129b. That no person shall hereafter locate any placer mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder’s office in the judicial division where the location is made.”

The most rigid construction of which this language is possible is that the power of attorney must be recorded in order to constitute a valid location. In other words, the law makes the record of the power of attorney essential to a valid location in the same manner that a discovery is essential to a valid location.

It is usually and perhaps correctly stated that a discovery must precede a valid location, but this does not mean that discovery must precede staking, marking the boundaries and recording; if all these acts be done first, then the location is made valid by a subsequent discovery, providing the discovery is made prior to intervening rights.

In the same way it may be held under the Wickersham Act that the power of attorney must

be recorded in advance of a valid location. This means that the location is not valid until the power of attorney is recorded. If it is recorded, however, and all other acts are completed before intervening rights, then the location is valid. *The location becomes valid when all essential acts are performed.* There must be a discovery. The boundaries must be marked. The power of attorney must be recorded. But the order in which these acts are performed is immaterial if all the acts necessary to a valid location are performed before intervening rights.

Location does not mean discovery. Location does not mean marking the boundaries. Location does not mean posting or recording notice of location. It means all these acts together. All acts required by law are necessary before there is a valid location of a mining claim.

But the order of the several acts is immaterial if all are performed before intervening rights.

“The order in which these acts of location took place is not essential, if no rights intervened.”

*Debney vs. Hes*, 3 Alaska 450.

“Generally speaking, under the laws of Congress as well as under state laws and local



rules, the natural and proper order of procedure to complete a location are (1) discovery, (2) posting notices, (3) recording notice, (4) marking boundaries, (5) development work; but the *order in which the several acts required by law are to be performed is non-essential, in the absence of intervening rights.* The marking of the boundaries may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will innure to the benefit of the locator." (Italics are ours.)

*Lindley on Mines* (3rd Ed.), Sec. 330.

Cited and approved by Justice Brewer in

*Creede and C. C. M. & M. Co. vs. Uinta T. M. & T. Co.*, 196 U. S. 337, 49 Law Ed. 501.

We quote the following from the opinion by Justice Brewer in the latter case, 25 Sup. Ct. Rep. 272:

"These suggestions add strength to the concurring opinion of three leading commentators on mining law (referring to Lindley, Snyder and Morrison), the general trend of the rulings of the department and decisions of the courts, to the effect that the order in which the several acts are done is not essential, except so far as one is dependent on another. Doubtless a locator does not acquire the right of exclusive possession unless he has made a valid location, and discovery is essential to its

validity; but if all the acts prescribed by law are done, including a discovery, is it not sacrificing substance to form to hold that the order of those acts is essential to the creation of the right?"

See also:

*Brewster vs. Shoemaker*, 28 Colo. 176; 53 L. R. A. 793; 80 Am. St. Rep. 188; 63 Pac. 309,

from which we quote:

"The order of time in which these several acts are performed is not of the essence of the requirements, and it is immaterial that the discovery was made subsequent to the completion of the acts of location, provided only all the necessary acts are done before intervening rights of third parties accrue. All these other steps having been taken before a valid discovery, and a valid discovery then following, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claim and refile their location certificate, or file a new one."

There are so many cases and authorities which might be cited in support of this statement that it would unduly extend the argument to attempt even a reference to all of them.

The locator is usually given a specific time after discovery in which to perform the additional acts required by state laws or local customs. For

instance, ninety days are allowed in most cases after discovery and posting of notice in which to mark the boundaries and record the notice. There is no such provision in either the Federal Law of 1872 or the Wickersham Act, the only law in force at the time of this location. Of course, a discovery is essential to a valid location. So, perhaps, is a recorded power of attorney when the location is made under such authority. Doubtless both are essential to a valid location, but it is even more reasonable to argue that the discovery must be made before the power of attorney is recorded, than to argue that the power of attorney must be recorded before the discovery is made. There is nothing in the law stating which must be done first. Is it not enough that both occur before intervening rights?

On this line of thought we shall quote again from the opinion of Justice Brewer in *Creede vs. Uinta*, *supra*:

“Suppose a discovery is not made before the marking on the ground and posting of notice, but is then made, and it and all other statutory provisions are complied with before the entry, which is an application for the purchase of the ground—*of what benefit would it be to the government to require the discoverer*

*to repeat the marking on the ground, the posting of notice, and other acts requisite to perfect a location? If everything has been done which, under the law, ought to be done to entitle the party to purchase the ground, wherein is the government prejudiced if the precise order of those acts is not followed? Or, to go a step farther, suppose, on an application for a patent, an adverse suit is instituted, and on the trial it appeared that the plaintiff in that suit had made a discovery and taken all the steps necessary for a location in the statutory order, although not until after the applicant for the patent had done everything required by law, would there be any justice in sustaining the adverse suit, and awarding the property to the plaintiff therein, on the ground that the applicant had not made any discovery until the day after his marking on the ground, and so the discovery did not precede the location?"*

Now when the power of attorney from Purdy to Gates was recorded on July 29th, 1913, all other acts required by law had been performed. There was a valid discovery of mineral; the notice was posted on the ground; the boundaries were marked by proper monuments. Manifestly, after Gates recorded the power of attorney on July 29th, he could have again gone on the ground and posted the same notice and set the same monuments. Why



need he do so? In the language of Justice Brewer, just quoted, "of what benefit would it be \* \* \* to repeat the marking on the ground, the posting of notice and the other acts requisite to perfect a location?"

We submit the conclusion is irresistible under the facts shown. Plaintiff Sutherland saw the notice posted by Gates for the defendant Purdy, and also the stakes and monuments marking the boundaries of the claim. (Record, pp. 89-90 and 105-7.) Gates could have gone on the ground again between July 29th and August 30th and posted another notice and set other monuments. The Supreme Court says he need not do so after discovery, even if such notice and monuments were set long before the discovery. Surely the discovery is equally as essential to a valid location as the record of the power of attorney. What line of reasoning can require him, under the Wickersham Act, to post a new notice and set new stakes after recording the power of attorney, if he is not obliged to do so after making an actual discovery?

The General Land Office has issued instructions under this Act (circular of October 29, 1912). They have occasion to advise claimants as to what is necessary to be done under this Act to constitute a

valid location as the basis of an application for patent. It is interesting to note that the department evidently does not believe that the power of attorney must be recorded in advance of the other acts. All the acts must be performed, but it makes no difference in what order the separate acts are performed. That is clearly the meaning of the instructions issued by the General Land Office. If the commissioner ever meant to hold that the power of attorney must be recorded prior to the other acts of location he would have stated so in his instruction.

It is also interesting to observe the language of the act passed by the Territorial Legislature of Alaska, approved April 30th, 1913 (Session Laws, page 283), and which went into effect after the Purdy location had been made. The Legislature re-enacted the Wickersham Act to a great extent, but evidently that body desired the power of attorney to be recorded in advance of the other acts. It is evident also that the Legislature did not construe the Wickersham Act to mean this, for while it adopted the language of the Wickersham Act, it was careful to provide that the power of attorney must be "recorded in the office of the recorder in whose precinct such location is made, previous

to the date of the initiation of such location.” Then the Legislature of 1915 (Session Laws, page 14) again amended the law so as to provide for the record of the power of attorney “prior to the date of the filing for record of any location thereunder.”

In other words, the Alaska Legislature meant to require the record of powers of attorney in advance of all other acts of location, and it said so. If Congress had meant to do the same, it also would have said so in the law it passed. Congress did not say so, and the courts will not legislate such a requirement into the act. Congress meant to abolish and did abolish the right to locate mining claims by agent without written authority. That right has always existed under the federal mining laws and still exists in the states (*Lindley on Mining* (3rd Ed.), Sec. 331.) Congress abolished that right in Alaska and made it necessary for the agent to have authority in writing to locate mining claims in Alaska. The written instrument must be acknowledged, and it must also be recorded in order to perfect a valid location by an agent. We submit that is all the Wickersham Act requires.

The lower court in passing upon this question called attention to the well known rule that forfeitures are odious to the law and not favored. In

his decision *in re Lakaitz vs. Johnson* (Appendix A), Judge Brown says:

“But the act does not in express terms require that the power of attorney be recorded before the first step is taken in making the location, nor unless the same is so done the location shall be null and void, and as said in *Sturtevant vs. Vogel* (167 Fed. 452), ‘the intention that failure to comply with the statute should work a forfeiture of mining rights ought not to be imputed to the Legislature except upon the very clearest language, not susceptible to any other reasonable construction.’ ”

Now we shall contend that the Wickersham Act does not in express terms render a location null and void for failure to record the power of attorney. The only forfeiture provision in that act reads as follows:

“Sec. 129e. That any placer mining claim attempted to be located in violation of this act shall be null and void, and the whole area thereof may be located by any qualified locator as if no such prior attempt had been made.”

Observe that the only thing declared null and void is a “placer mining claim attempted to be located *in violation of this act.*” Now it would be a violation of that act to attempt to locate more than forty acres in an association placer, or to



locate more than two claims during any calendar month, but surely it cannot be said that to post a notice or mark the boundaries of a location before the power of attorney be recorded is a violation of the act.

The Legislature of Alaska recognized this distinction in the act of April 30th, 1913. (Session Laws of 1913, p. 289.) Sections 12 $\frac{1}{4}$ -12 $\frac{3}{4}$  incl. limit the size of an association placer and the number of claims which may be located by any person. Sections 14-17 incl. of that act require the locator to do certain things, such as posting notice, marking boundaries and record. Now it is to be noted that Section 18 treats any attempted location in excess of the amount allowed as a *violation* of the act, but a failure to properly post or record notice is *merely a non-compliance*. Note the language of that section:

“If the discoverer of any placer deposit fail to comply with any of the provisions of Sections 14, 15, 16 and 17, within the time therefor specified, all right to appropriate any portion of the public domain, acquired by him by reason of his discovery, shall cease; and any placer mining claim attempted to be located in violation of sections 12 $\frac{1}{4}$ , 12 $\frac{1}{2}$  and 12 $\frac{3}{4}$ , or any of them, shall be null and void, and the area thereof may be located by any

qualified locator as if no such previous attempt had ever been made.”

The Legislature drew a clear distinction between a violation of the law and a non-compliance with it. It is clear and explicit in its terms, and allows the locator nothing in either event. The Legislature was very careful about this, while the Wickersham Act merely provides a forfeiture for locations attempted in violation of its terms—not of locations made merely without full compliance with its terms.

The only acts necessary to locate a placer claim in Alaska at the date of the Purdy location was a discovery and marking of the boundaries. Posting of notice and record was not then required. *Sturtevant vs. Vogel, Supra.* Did Gates violate the Wickersham Act when he made the discovery before his power of attorney was of record? Manifestly not, nor did he violate the act by marking the boundaries. Perhaps his marking was non-effective until he recorded the power of attorney, but he violated no law by doing so. His power of attorney was recorded, however, more than a month before plaintiff Sutherland went upon the ground. Was it necessary for Gates to again mark those boundaries—the only other act necessary to

perfect the location? He could have done so any time between July 29th and August 30th, but it would have been “a useless and idle ceremony which the law does not require,” as stated in *Brewster vs. Shoemaker, supra*.

Counsel for plaintiff contended before the trial court that the recording of the power of attorney was not one of the required acts of location, but a step essential to qualify the locator. But even if that contention were true, would Gates be required, after recording his power of attorney, to go again upon the ground and perform the “useless and idle ceremony” of pulling up and re-setting the same stakes or again marking the boundaries with the markings already there? He had already marked the boundaries, and the Wickersham Act does not attempt to declare such marking void.

## ARGUMENT UPON THE SECOND QUESTION.

The plaintiff in error will doubtless contend, as he did before the trial court, that the power of attorney from the defendant Purdy to Gates was not recorded as required by law, and that the location of the ground in controversy by Gates for Purdy is void for that reason.

The defendant in error contends that the power of attorney was duly recorded within the meaning of the law when it was delivered to the official recorder of the White River Recording District on July 29th, 1913, and by him filed for record.

The Alaska laws contain no express provision for the manner of recording powers of attorney. The only reference we find is in Section 379, Compiled Laws of 1913 (Sec. 15, Carter's Code), which merely provides for record of deeds, contracts, mortgages, powers of attorney, etc., in separate books, a requirement generally disregarded in Alaska. Section 522, Id., relates solely to the record of conveyances, and concludes with the words "every conveyance shall be considered as recorded at the time it was so received."

There being no express provision of law in Alaska governing the manner of recording powers of attorney, we must be governed by the general rules of the law as to records and when same are to be considered as effective. Cyc. thus states the general rule:

"An instrument is ordinarily deemed to be recorded when its holder leaves it with the proper officer for the purpose of being recorded, even though it is not then actually re-



corded, or is recorded in the wrong book; and the person so depositing it in good faith is not required to see that the officer properly performs his duty, or to be prejudiced by a failure of the latter to do so."

Vol. 34 Cyc., pp. 588-9.

*Cady vs. Purser*, 131 Cal. 552, 63 Pac. 844, states clearly the distinction which must be made in the record of different kinds of documents, according to the purpose which the record is intended to serve. For instance, there is a wide difference between the record of a mortgage and a marriage certificate. The mortgage record is intended to *give notice*, and serves no purpose unless it *actually gives such notice*. The record of an official bond, or of a marriage certificate, is to complete the act or to comply with a statutory requirement. The latter is the only purpose served by the record of a power of attorney. Surely a power of attorney need not be recorded to protect innocent parties by any form of notice. No, it must be recorded to comply with a statute intended to guard against frauds, precisely for the same reason as the official bond and the certificate of marriage are required to be recorded. This distinction is splendidly stated in *Cady vs. Purser*, from which we quote at pp. 845-6:

“For the purpose of complying with a statutory requirement, as in the case of official bonds or certificates of marriage, where the evident purpose of the statute is to make the instrument a matter of public record, or when the recording of an instrument is an essential step in perfecting some right or completing some act of the party, as in the case of a declaration of homestead, or an assignment for the benefit of creditors, the depositing of the instrument in the recorder’s office is sufficient; but when merely making a record of the instrument is not the ultimate purpose of the party, but the recording of the instrument is the means by which his ultimate purpose is to be carried into effect—as when his purpose is to give notice of his interest in real estate—Section 1213 requires not only that the instrument shall be filed with the recorder for record, but that it shall also be “recorded as prescribed by law.” By this requirement, in order that constructive notice of the contents shall be given to subsequent purchasers and mortgagees, the Legislature must have intended something in addition to depositing the instrument in the recorder’s office for record, since that had already been provided for in Section 1170.”

The distinction is well drawn in that decision. It points out specific statutory requirements for the record of a mortgage in California in order that same shall give the necessary constructive

notice. Even that might be unnecessary were it not for the specific statute in California. Without the specific statute, the rule would doubtless be the general rule stated in Cyc. Certainly, in Alaska, without a specific statute as to powers of attorney, the general rule stated in Cyc. must prevail, and more especially as to the statute relating specifically to conveyances (Sec. 522) provides that same "shall be considered as recorded at the time it was so received." Surely a greater requirement cannot be construed for an instrument not bearing notice to possible innocent parties or subsequent purchasers for value.

The case of *Watkins vs. Wilhoit*, 38 Pac. 53, fully recognizes this distinction. There the court held that an assignment for the benefit of creditors, which was not recorded or transcribed in the record books of deeds, but simply in "Book G, Miscellaneous," was valid as to creditors, although it might be questioned by a subsequent purchaser or mortgagee.

*Lindley on Mines* (3rd. Ed.), Sec. 390, states:

"If the certificate is deposited with the recorder to be recorded, that is sufficient. His failure to record will not injure the locator."

Citing *Shepard vs. Murphy*, 26 Colo. 350, 58 Pac. 588, from the syllabus of which we quote:

“Where the locator of a lode claim lodges his certificates with the proper officer for record within three months from discovery, and the officer notifies him that it will be recorded, he has done all that is required of him by Mills’ Ann. St., Section 3150, requiring that he shall record his claim in the office of the county recorder by a location certificate within that time.”

*Shamel on Mining Law* (p. 122) states:

“If the locator makes his location properly, and files the notice with the proper officer, the negligence of such officer in making mistakes or in not recording it will not deprive the locator of his rights.”

No doubt the record of the power of attorney, as required in Alaska by the Wickersham Act, is an “essential step in perfecting some right or completing some act,” as stated in *Cady vs. Purser*, *supra*, but in such cases “the depositing of the instrument in the recorder’s office is sufficient,” as therein stated.

A holding adverse to our contention would invalidate dozens of locations made in the Shushana region, and doubtless elsewhere throughout Alaska, for it is well known that local recorders, especially



in mining districts in Alaska and elsewhere, and more especially during the rush following a new "strike," do not record documents with care. Details cannot be elaborately exacted. No good purpose would be served thereby. The plaintiff in error would have been in no different position had the power of attorney and location notice been recorded in *extenso*. In any event, he is not an innocent sufferer through any failure or neglect of the recorder, as the defendant and dozens of others of the first locators would have been had the court held with plaintiff's contention.

Such a ruling will surely result in manifold litigation, perhaps fifty new law suits in the Shushana region alone. The great wrong thereby wrought upon the first locators, innocent men acting in the utmost good faith, will be given due and thoughtful consideration by the court.

The defendant in error respectfully submits that the writ should be denied and the judgment affirmed.

Respectfully submitted,

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*Attorney for Defendant in Error.*

LYONS & ORTON,

*Of Counsel.*



## APPENDIX A.

### *Decision of the court in re Likaits vs Johnson in the District Court at Cordova, Alaska, March 18, 1914.*

The plaintiff in this action seeks the possession of a placer mining claim in what is known as the Shushanna mining region, Alaska. Plaintiff claims to be the owner of said mining claim and that on or about the 20th of August, 1913, the defendant unlawfully entered thereupon and ousted the plaintiff therefrom.

The intervenors, James, Nelsen, Johnson and Wales, allege that on May 25th, 1913, they made two contiguous lode locations; that about August 20th, 1913, the plaintiff entered upon a portion of the ground covered by said lode locations and attempted to make the placer location alleged by plaintiff in his complaint.

The defendant Johnson by his answer claims that he is the owner of the placer claim known as No. 1 Above Discovery on Bonanza Creek, being the same ground covered by plaintiff's placer claim described in his complaint; that the defendant since prior to July 30th, 1913, was and ever since has been the owner and in possession thereof by right of discovery and location, and denies that plaintiff has any right in or to said placer mining claim.

The case is submitted upon an agreed Statement of Facts entered into in writing by the attorneys for the plaintiff, defendant and intervenors, from which it appears that the defendant Johnson outfitted or grubstaked William E. James at Dawson about September 1st, 1912, to go upon a prospecting trip near the headwaters of White River, in the Territory of Alaska, James taking with him a power of attorney executed by Johnson to James, dated June 7th, 1909, authorizing James to make placer mining locations in Alaska as attorney-in-fact for Johnson; that about Christmas 1912 James, together with Nelson and Wales, reached Beaver Creek, near the international boundary line between Alaska and the Yukon Territory and camped at a cabin owned by James about forty miles from the headwaters of the Shushanna. In March, 1913, Nelson and James made a prospecting trip to the Shushanna and returned

to the cabin at Beaver Creek, remaining there until the middle of April, when James, Nelson and Wales left for the Shushanna region, taking their outfit for the summer's prospecting. They left a considerable portion of their outfit at Beaver Creek. James also left said power of attorney at Beaver Creek with his other effects. At this time there was no United States commissioner or recorder in said White River district, but on May 7th, 1913, the judge of this court established the White River Recording Precinct and appointed one H. E. Morgan commissioner thereof. James, Nelson and Wales reached Shushanna late in April, and James made the first discovery of placer gold in said district on Bonanza Creek early in May. On July 8th, 1913, he located the placer ground in controversy, consisting of twenty acres on Bonanza Creek, a tributary of the Shushanna, designating it as placer claim No. 1 Above Discovery on Bonanza.

Prior to this, on May 25th, 1913, intervenors made valid discovery and location of two certain lode locations or claims designated as the Bonanza and Eldorado quartz mining claims, which extend almost at right angles across the lower or southerly 500 feet of placer claim No. 1 Above Discovery on Bonanza, claimed by defendant. It was then believed by the defendant Johnson and also by James and Nelson that the White River region of Alaska, including the so-called Shushanna diggings, was within the Forty Mile district, where the recording office is at Steele Creek, Alaska. The White River region had been included in the Forty-Mile recording district until the Fourth Judicial Division was created in 1909. The fact that it was thereby segregated from the Forty-Mile district had not become generally known to the prospectors in the White River region. The general custom was to send location notices and other instruments for record to the recorder at Steele Creek in the Forty-Mile district, where the same were recorded as late as the summer of 1913. This custom was known to James and his companions and also to the defendant Johnson, all of whom fully relied and acted upon the same.

On May 13th Nelson left for Dawson to confer with defendant Johnson and to arrange for an outfit for placer mining during the summer. En route he went through Canyon City, Y. T., where he learned that on the previous day said H. E. Morgan had departed for Dawson. Nelson continued his journey, overtook Morgan and traveled with him to Dawson. Said Morgan did not know of his appointment as commissioner of the new White River precinct until after his arrival at Dawson. Neither did Nelson know of it. Nelson met Johnson in Daw-



son, where Johnson provided an outfit for placer mining operations costing over \$600. They were also then advised of the Act of Congress of August 1st, 1912, requiring that powers of attorney be recorded. Johnson then executed his power of attorney to James, dated May 28th, 1913, and forwarded same to Steele Creek, Alaska, in the Forty-Mile district of Alaska, being in the Fourth Judicial Division, where the same was recorded June 23rd, 1913. Nelson returned to the Shushanna, traveling with several others, and they arrived at the Shushanna diggings about June 26th, 1913. The said Morgan arrived in the Shushanna on or about July 20th, 1913, and established a recording office.

Upon the arrival of Nelson and party in the Shushanna about June 26th, 1913, with the information that Morgan would soon be there and a recording office established, James sent one Gates to his cabin on Beaver Creek to obtain the Johnson power of attorney that same might be promptly recorded upon the arrival of Morgan. Gates met with an accident which so detained him that he did not return to Shushanna until August 7th, 1913. On said date, to-wit: August 7th, 1913, James, as attorney-in-fact for Johnson, having performed all the acts required by law in the matter of discovery, notice, and marking the boundaries of said placer claim No. 1 Above Discovery on Bonanza, filed a notice of location thereof in due form with the said Morgan as United States commissioner and ex-officio recorder, and same was recorded at page 89 Volume 1 of the mining records of said White River Recording District, Alaska, and also on the same day, recorded said power of attorney from Johnson to James.

That plaintiff Likaits arrived in the Shushanna diggings early in August, went upon the ground in controversy included in the claim designated as No. 1 Above Discovery on Bonanza Creek, and made a discovery of mineral thereon on August 20, 1913. On the same day he posted a notice of location within a few feet of the notice posted by James for defendant Johnson. Defendant's location notice as well as plaintiff's were both posted upon the area in conflict with the Bonanza and Eldorado lode locations made by the intervenors.

Plaintiff on August 20th, 1913, staked and marked the boundaries of the placer ground claimed and described in his complaint and otherwise complied with the laws of the United States and of the territory of Alaska in force at that date. The defendant's notices of locations and the stakes and markings established for the defendant by James in May, 1913, as

well as the monuments of the lode locations, all remained on the ground and were seen by plaintiff. Plaintiff duly recorded his notice of location in the said White River precinct on September 19th, 1913.

It is agreed that judgment in this action for possession of the ground in controversy may include judgment for one dollar damages and costs of suit. The mineral character and value of the ground is admitted. It is also admitted that plaintiff, and said James as attorney-in-fact for defendant, each made a satisfactory discovery of placer gold on the dates of their respective admitted locations. It is admitted that both locations were properly staked upon the ground. It is admitted that all acts performed by the defendant and in his behalf were regular and sufficient to constitute a valid location of the ground had the power of attorney from said defendant to James been duly recorded in any recording office in the Third Judicial Division of Alaska prior to July 8th, 1913. It is admitted that the acts of plaintiff were sufficient to constitute a valid location if the ground was then open for prospecting and subject to location in the manner provided by law, and it is admitted that all subsequent acts by plaintiff or in his behalf were in due form.

Prior to August 1st, 1912, any citizen of the United States, or one who had declared his intention to become such, could locate lode or placer mining claims in Alaska without limit as to number. He could also locate the same as agent for another without having any power of attorney, although it had long been the custom of prospectors to procure such powers of attorney.

By the Act of Congress passed August 1st, 1912, it is provided:

"That no person shall hereafter locate any placer mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Any person so authorized may locate placer mining claims for not more than two individuals or one association under such power of attorney, but no such agent or attorney shall be authorized or permitted to locate more than two placer mining claims for any one principal or association during any calendar month, and no placer mining claim shall hereafter be located in Alaska except under the limitations of this act.

“That no person shall hereafter locate, cause or procure to be located for himself more than two placer mining claims in any calendar month: Provided, That one or both of such locations may be included in an association claim.

“That no placer mining claim hereafter located in Alaska shall be patented which shall contain a greater area than is fixed by law, nor which is longer than three times its greatest width.

“That any placer mining claim attempted to be located in violation of this act shall be null and void, and the whole area thereof may be located by any qualified locator as if no such prior attempt had been made.”

The plaintiff's contention in this case is that the location by the defendant Johnson of placer claim No. 1 Above Discovery on Bonanza Creek, made by James as attorney-in-fact on July 8th, 1913, is null and void for the reason that the power of attorney from Johnson to James was not recorded before July 8th, 1913.

The determination of this question involves the consideration and construction of said Act of August 1st, 1912.

The purpose and intent of this act was unquestionably to correct the abuse, which had become so prevalent throughout Alaska, of staking and locating placer claims without number by those who preferred to use the hatchet and pencil rather than the pick and shovel. From the earliest days of the discovery of gold in California—the customs of miners which grew up out of necessity, and the subsequent federal legislation of 1866 and 1872, since construed and settled as they have been by federal and state courts, have fairly answered the needs of the prospectors and miners in the mineral public land states. In Alaska, however, the extremely liberal policy of the government has been grossly abused by the speculative so-called prospector, who by staking large areas of ground has sought to exact tribute from the more willing and industrious workers who happened to be late in point of time. The act above referred to is intended to correct this evil and should be given every effect to obtain that desirable end. No similar legislation by Congress was ever before enacted. The language of this act is so clear and plain that no dispute seems likely to arise thereunder, except this very important question—Must a power of attorney be recorded before the time the first step is taken in the location of a placer claim by the attorney-in-fact?

Prior to this Act of August 1st, 1912, three acts were necessary to constitute a valid location of a placer mining claim: first, discovery; second, marking of the boundaries of the claim upon the ground, and third, recording of the location certificate. It has been held by the Supreme Court of the United States and many times by the Alaska courts, and may be regarded as the settled law, that it is immaterial in what order these acts are performed, provided they are all performed before the accruing of any intervening or adverse rights.

In the case of *Creede & C. C. M. & M. Co. vs. Uinta T. M. & T. Co.*, 196 U. S. Supreme Court Reports, 336, Mr. Justice Brewer (citing *Brewster vs. Shoemaker*, 28 Colo. 176, and other authorities), says on page 348:

“The order of time in which these several acts are performed is not of the essence of the requirement, and it is immaterial that the discovery was made subsequent to the completion of the acts of location, provided only, all the necessary acts are done before intervening rights of third parties accrue. All these others steps having been taken before a valid discovery, and a valid discovery then following, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claim and refile their location certificate or file a new one.”

And that has been the general doctrine. In 1 *Lindley on Mines*, 2nd Ed., Sec. 330, the author says:

“The order in which the several acts required by law are to be performed is non-essential, in the absence of intervening rights. The marking of the boundaries may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator. But if the boundaries are marked before discovery, the location will date from the time discovery is made.”

In *Snyder on Mines*, Sec. 354, it is said:

“While the general rule is, as stated elsewhere in the foregoing sections, that a location must rest upon a valid discovery, yet a location otherwise good, with a discovery made after location and before the intervention of adverse claims or the creation of adverse rights, will validate the location from the date of discovery, and generally from



the first act towards claim and appropriation—this by relation.”

In Morrison’s Mining Rights, 11th Ed., p. 32:

“If a location is made before discovery, but is followed by a discovery in the discovery shaft before any adverse rights intervene, such subsequent discovery cures the original defect and the claim is valid.”

This same question has been repeatedly decided by Alaska courts—See Heman vs. Griffith, 1 Alaska 264; Redden vs. Harlan, 2 Alaska 402, where the court says:

“The marking of the boundaries may precede the discovery and recording or the recording may be first, and if all three are performed, though not within the time fixed by law or the rules and regulations, before other rights intervene or attach to the land, it is sufficient and the claim will be valid.”

In addition to the said three essential acts necessary to make a valid mining location, there is now added, by this Act of August 1st, 1912, a fourth, to-wit: that a person locating a placer claim in Alaska as attorney for another shall be duly authorized thereto by a power of attorney in writing duly acknowledged and recorded in any recorder’s office in the judicial division where the location is made. Counsel for plaintiff contend that this is not an act of location but is a qualification of the one making a location as attorney-in-fact for another and the power of attorney must be recorded before the first step is taken in attempting to make such location of a placer claim. In the same sense the recording of a certificate of location is not an act of location but an evidence only that a location has been made. The executing and recording of the power of attorney is an evidence only that the attorney-in-fact was duly authorized thereto, and **the act does not in express terms require that such power of attorney must be recorded before any initial step is taken** to make a location of a placer mining claim. In a broad sense every act and thing necessary to be done before the location is perfected may properly be termed one of the acts of location.

The legislature of Alaska seems to have recognized that said Act of August 1st, 1912, did not require a power of attorney to be so recorded, and by an act passed April 30, 1913, which became operative July 29th, 1913, provided:

"That no person shall hereafter locate any mining claim in the Territory of Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, which shall be witnessed by two witnesses but need not be acknowledged, and recorded in the office of the recorder in whose precinct such location is made, previous to the date of the initiation of such location."

In the case of *Sturtevant vs. Vogel*, 167 Fed. 452, the Circuit Court of Appeals for the Ninth Circuit held that in Alaska a notice of location of a mining claim is not required to be recorded. The law merely permits the recording of such instrument, and the court says, citing the case of *Ford vs. Campbell*, 92 Pac. 206:

"The intention that failure to comply with the statute should work a forfeiture of mining rights ought not to be imputed to the legislature except on the very clearest language, not susceptible to any other reasonable construction."

It is a sound principle of equity and good conscience that forfeitures are odious in the law, and the courts will not resolve a doubt, either of law or fact, in favor of a forfeiture of property rights. *Butler vs. Good Enough Mng. Co.*, 1 Alaska 246; *Debney vs. Iles*, 3 Alaska 438.

James, the attorney-in-fact for defendant Johnson, using money and supplies of Johnson, had gone into a remote and inaccessible portion of the interior of Alaska, enduring the hardships of an Arctic winter, and the following spring or summer had through his enterprise and industry made a valuable discovery resulting in what later became known as the Shushanna strike. In the name of and for the benefit of the person whose financial support had enabled him to enter upon this arduous undertaking, he located placer claim No. 1 Above Discovery on Bonanza Creek. He is provided at this time with a power of attorney duly executed and acknowledged by Johnson June 7, 1909.

Without commenting on the numerous details evidencing the good faith of James in attempting to comply with the law, it appears that he filed for record this power of attorney on the same day that he filed his notice of location, to-wit: on August 7th, 1913, with the United States Commissioner and ex-officio Recorder Morgan, who had only come into the said region and established an office about July 20th, 1913. It would have been impossible for him to have recorded said

power of attorney with said recorder before July 8th, the date when he initiated said location of Bonanza No. 1 Above Discovery, for the reason that no recording office then existed there. The nearest recording district in the Third Judicial Division was distant about 200 miles, to-wit: at Copper Center or Chitina, which said two recording precincts were over and beyond an impassable range of mountains, far to the south and west, with glaciers and swift and dangerous rivers intervening, and yet the plaintiff insists that the defendant should, prior to July 8th, 1913, have recorded this power of attorney in some recording district somewhere in the Third Judicial Division of Alaska, which extends from the international boundary line between Alaska and British Columbia to the Aleutian Islands, reaching past the 180 Meridian into the Eastern Hemisphere. Of what possible use to the plaintiff could such a literal compliance with what he claims to be the requirement of this act have been, that said power of attorney be recorded hundreds of miles away, far beyond the ken or knowledge of plaintiff? The plaintiff did not come into the Shushanna country until August. When he went upon the ground he saw the notice and stakes and markings of the defendant on the ground. Some two weeks before he attempted to make his location, the last act of location on the part of the defendant had been performed, to-wit: the recording of the notice of location and the recording of the power of attorney, and yet the plaintiff seeks to appropriate the fruits of the toil and enterprise of the defendant and deprive him of his just reward, because said power of attorney was not sooner recorded. It seems a most unconscionable thing to do and to award him this ground would be a travesty on justice, and should only be done in case the said Act of August 1st, 1912, is susceptible of no other reasonable construction than that the power of attorney therein provided for must be recorded, not in the recording precinct where the claim is situate, but anywhere within a judicial division extending over hundreds of miles, in most instances with no practicable means of communication between the fifteen or more recording precincts therein, before any step whatever is taken by the attorney-in-fact to initiate the location of a placer mining claim. It is well known that prospectors are migratory and easily stampeded, and a prospector might have a power of attorney duly recorded at Nushagak or Susitna and starting on a long trail to some new strike, consuming weeks of laborious and dangerous travel, and be qualified on reaching the new strike to locate a claim as attorney-in-fact, because he had his power of attorney recorded in a place utterly beyond the reach or knowledge of



one seeking to take his claim away from him. Here the power of attorney was recorded right where both plaintiff and James were, and where the mining claim was situate, and two weeks before the plaintiff made any attempt to locate the ground over defendant's location.

The primary purpose of this act was to limit not only the number of claims that could be located by an attorney-in-fact to two claims in each calendar month, but as well to limit the number of claims that any person could locate in his own name and right.

It would seem that a reasonable construction of this act would be to require that an agent or attorney be authorized by a power of attorney executed and acknowledged before the first step is taken in making a location, but it is not necessary to decide that question in this case, for concededly the power of attorney from Johnson to James was so executed and acknowledged in June, 1909.

But the act does not in express terms require that the power of attorney be recorded before the first step is taken in making the location, nor unless the same is so done the location shall be null and void, and as said in *Sturtevant vs. Vogel*, supra, "the intention that failure to comply with the statute should work a forfeiture of mining rights ought not to be imputed to the legislature except upon the very clearest language, not susceptible to any other reasonable construction."

In the leading case of *Jupiter Mining Co. vs. Bodie Company*, 11 Federal 666, 4 Morrison Mng. Rep. 428, the court says:

"As a general principle of law, forfeitures are not favored. \* \* \* The congressional law does not require a record, but prescribes what a record shall contain when it is required by the local rules.

"If there were no local rules in Bodie mining district attaching the penalty of forfeiture to the failure to record in that district, and recording was not made by custom an act of location, then the fact that the Lucky Jack claim was not recorded in the records of Bodie mining district will not invalidate the location, as to any party having actual notice of that location, and in that case the jury are instructed that if the Lucky Jack location was regular in all other respects, and the laws requiring work were complied with, the fact that the claim was not recorded in the Bodie mining district did not invalidate the location, or make it lawful for plaintiff's grantors, if they



had actual notice of the previous location, to enter and locate the ground covered by the Lucky Jack location."

It is admitted that plaintiff had actual notice of the marking on the ground of said No. 1 Above Discovery on Bonanza, and that the location certificate and also the power of attorney were duly recorded in that particular precinct two weeks before plaintiff attempted to make his location, not as the courts have said "as a discoverer, but as an appropriator"—an appropriator of the fruit of other men's labor and toil.

In view of the principles and authorities above cited, I am of the opinion that a fair and reasonable construction of this act is that a forfeiture of a placer mining claim is not worked by the failure to record the power of attorney before the first step is taken in making the location of such claim, and especially is this true in a case where the attorney has been duly authorized thereto by a power of attorney executed and acknowledged before such initial step is taken.

I again repeat that the evident purpose and intent of this act was to limit the number of claims that might be located, and not to provide for a forfeiture for failure to record the notice of location. I do not believe it to be the intent of the act to work a forfeiture for failure to record the power of attorney, where it is recorded prior to the attaching of the rights of others.

On account of the views herein expressed, as to the construction and effect to be given to said Act of August 1st, 1912, it will not be necessary to inquire what was the legal effect, if any, of the recording on June 23rd, 1913, in the Forty-Mile precinct in the Fourth Judicial Division of Alaska of the power of attorney by Johnson to James dated May 28th, 1913.

Ignorance of the law is no excuse, but this recording at Forty-Mile, together with the other facts set out in the agreed statement, under the peculiar conditions existing in the remote and inaccessible interior regions of Alaska, all point to the good faith of defendant and his honest effort to comply with the law.

As to the rights of the intervenors in the two lode locations claimed by them, there seems to be no question but what, upon the agreed statement of facts, they were the prior locators of, made valid lode locations of the same, and are entitled to the 500 feet of the lower or southerly end of said Bonanza No. 1 Above placer claim.

I am compelled therefore to hold that plaintiff take nothing by this action and his complaint be dismissed; that the intervenors are entitled to the possession of the said two lode claims designated as the Bonanza and Eldorado quartz mining claims, including the lower or southerly 500 feet of the said placer claim No. 1 Above Discovery on Bonanza Creek; that the defendant is entitled to the remainder of said placer claim.

Findings and decree may be entered accordingly.

FRED M. BROWN, Judge.

Dated at Cordova, Alaska, March 18, 1914.

## APPENDIX B.

*Decision of Judge Brown in re Sutherland vs Purdy in the District Court at Cordova, Alaska, April 2, 1914, overruling plaintiff's objections to testimony as to the power of attorney from defendant to G. L. Gates.*

Section 129b, Compiled Laws of Alaska, enacted August 1st, 1912, provides:

"That no person shall hereafter locate any placer mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made."

I had occasion to construe this section in the recent case of Lakaits vs. Johnson (decided March 18, 1914), and there held that the act of recording the power of attorney was one of the acts of location, and that it is immaterial in what order the several acts of location are performed, provided they are performed before the rights of another intervene.

In this case, defendant Purdy claims to have given his power of attorney in writing, duly acknowledged, to one Gates on May 31st, 1913. Gates claims that he made a location on a placer claim for Purdy, under said power of attorney, on July 6th, 1913, and that he made discovery, marked the boundaries of the claim, and on July 27th, 1913, filed his location certificate with the recorder at Shushanna (or White River precinct), and on July 29th filed said power of attorney with said recorder. On the trial of this case, the witness Gates claims that he has lost said original power of attorney, and testifies that he has made diligent search therefor, giving details of where and when and how he made search and cannot find it.

Had the power of attorney been properly recorded by the recorder in said precinct, said record would have been offered and received as proof thereof. However, said recorder, having just assumed his office, and being unfamiliar with the duties thereof, and being in a remote and inaccessible region in the far interior of Alaska, evidently proceeded on the theory that

a mere abstract of the documents filed for record with him, was sufficient. Accordingly in this case he made the following entry in Book 1 of the Record at page 280:

"July 29, 1913.

Frank W. Purdy to G. L. Gates.

Sworn to before R. McDonald of Forty Mile.  
Jas. McLeod.

May 31st, 1913.

Recorded at 55 m. past 6 a. m. July 31, 1913.  
By request W. E. McKinney.

H. E. MORGAN, Rec'r.  
H. H. Waller, Dep."

Defendant offers in evidence this record, together with the page immediately preceding and the page immediately following for the purpose of illustrating the method of said recorder in making said records or abstracts thereof, and also offers to prove, by the oral evidence of the witness Gates, the contents of said power of attorney claimed to have been lost. Defendant also claims to be able to prove the same facts by witness McKinney, who received the power of attorney from Gates and gave it to the recorder to be recorded.

Under the system in force in Alaska, whereby U. S. commissioners and ex-officio recorders receive fees only, in remote places it is exceedingly difficult to get competent and well qualified officers to fill such positions, where the fees may not afford even a living, and the methods of recording are often crude, as appears was the case here.

While there is a conflict in the authorities, there is abundant authority to support the proposition that when one has delivered an instrument for record to the proper officer, his duty ceases. See *Shepard vs. Murphy*, 58 Pac. 589, a Colorado case.

"In the absence of any statute requiring it, a power of attorney need not be acknowledged or recorded, although as matter of proof of authority the power may be and usually is recorded with any recorded instrument which has been executed under it \* \* \*. As the purpose of requiring acknowledgment and record is thereby to give notice to third persons, failure to record the power of attorney even when recording is required by law, will



not invalidate the agent's acts thereunder except as to creditors and subsequent purchasers without notice, unless the statute makes recording a prerequisite to authority to act, or provides that unrecorded instruments shall be absolutely void." 31 Cyc. 1231.

Counsel for plaintiff suggests that as plaintiff does not take the interest claimed by him by descent, he in law is a purchaser. But can it be said that he is a purchaser "without notice"?—Surely not, for the staking on the ground, the notice of defendant posted on the ground, every fact and circumstance in this case points conclusively to the fact that the plaintiff had actual notice that the ground he attempted to locate was already located and claimed by another, who signed the location as attorney-in-fact for his principal.

The purpose of this Act of August 1st, 1912, I am satisfied was primarily to limit the number of locations that could be made to two each calendar month. It was not intended in my opinion that the recording of the power of attorney was intended primarily to give notice to one seeking to make a location of unappropriated and unclaimed public mineral land.

That notice in most cases, and particularly in this case, was given to the subsequent locator, the plaintiff here, by the actual stakings or markings on the ground. The plaintiff testifies that he did not even look at the records, did not make any attempt to find if any location certificate or power of attorney had been filed or recorded by defendant, but that he did find the ground staked and defendant's location notice on the ground, but as plaintiff claims giving a misdescription of the claim. Had he have done so he would have found at least this abstract of the power of attorney which would have advised him that such an instrument had been filed by defendant.

Had the author of this Act of August 1st, 1912, intended that the recording of the power of attorney was for the sole or primary purpose of giving notice to a subsequent locator, he, Hon. James Wickersham, long one of the district judges in Alaska, and thoroughly familiar with the needs and peculiar conditions prevailing in this territory, would not have been satisfied with the provision that such power of attorney might be recorded anywhere in the judicial division wherein the location was made.

In this, the Third Judicial Division, such recording might literally have been done at a point over one thousand miles

distant from the place where a placer location could be made thereunder, and of what avail, as a matter of notice would such recording be?

I feel satisfied that the record made by the recorder, Morgan, of this power of attorney, defective though it be, ought to be admitted in evidence. That the defendant in good faith filed it for record and paid the recording fee, and had a right to rely upon the recorder performing his duty in recording it properly. To hold otherwise would be virtually to hold the location of defendant void, regardless of the fact that he may have made a valuable discovery, properly marked his boundaries on the ground, and otherwise complied with the law.

I am also satisfied that the defendant has met the requirements of the law in his showing of diligence in searching for the lost power of attorney, and should be permitted to give oral evidence of its contents. I am strengthened in this opinion by reason of the fact that the defendant made an application for a continuance in this case for the purpose of making further search for this lost document; and upon the court suggesting to counsel for plaintiff that terms might be imposed to indemnify plaintiff and his witnesses for loss of time and expense of delay if such continuance was granted, they did not meet such suggestion further than to set out in an affidavit that plaintiff would be damaged by such delay in more than three thousand dollars.

To reject the evidence thus offered by defendant would practically work a forfeiture of his mining claim, if it be sufficient in other respects, and so resting upon that highly useful and salutary principle that forfeitures are odious in the law, the courts will not resolve a doubt, either of law or fact, in favor of a forfeiture of property rights, I am compelled to overrule the objections to the introduction of the evidence so offered by defendant.

Filed April 2, 1914.

**In the United States Circuit Court  
of Appeals for the  
Ninth Circuit**

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DAN D. SUTHERLAND,

*Plaintiff in Error,*

*vs.*

FRANK W. PURDY,

*Defendant in Error.*

---

No. 2583

WRIT OF ERROR TO THE DISTRICT COURT  
OF THE TERRITORY OF ALASKA,  
THIRD DIVISION.

---

HON. FRED M. BROWN, *Judge.*

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MAURICE D. LEEHEY,  
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Alaska Building,  
Seattle, Washington.

LYONS & ORTON,  
Of Counsel.

**Filed**

SEP 5 - 1913

F. D. Monckton,  
Clerk.





# In the United States Circuit Court of Appeals for the Ninth Circuit

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DAN D. SUTHERLAND,

*Plaintiff in Error,*

*vs.*

FRANK W. PURDY,

*Defendant in Error.*

---

No. 2583

WRIT OF ERROR TO THE DISTRICT COURT  
OF THE TERRITORY OF ALASKA,  
THIRD DIVISION.

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MOTION FOR REHEARING.

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The defendant in error respectfully moves for a rehearing upon the following grounds:

1st. That the court has misconstrued the law applicable to this case, and particularly the Act of Congress approved August 1st, 1912, in that there is nothing in said Act, or in the laws of the United

States, or of the Territory of Alaska, which renders null and void a placer mining location made upon the public domain in Alaska by power of attorney prior to July 30th, 1913, because of the failure to record such power of attorney prior to the performance of other acts of location.

2nd. That the judgment of the trial court herein should not be reversed for the reason that this is an action in ejectment, and the plaintiff must rely on the strength of his own title and not on the infirmities of defendant's title, and the plaintiff in this case failed to comply with the laws of the Territory of Alaska in locating the alleged mining claim upon which his cause of action is based.

3rd. Even if this court should reverse the judgment of the trial court, it should order a new trial.

### ARGUMENT.

The majority opinion holds, in substance, that under the so-called Wickersham Act of August 1st, 1912, the power of attorney must be recorded prior to the other acts of location, its record prior to intervening rights being held insufficient, presumably

on the ground that acts of location attempted prior to its record are null and void.

The rule is recognized, as stated in *Creede etc. vs. Uinta etc.* (196 U. S. 337, 49 Law Ed. 501), that a location attempted prior to discovery is made valid by a subsequent discovery before intervening rights. This in spite of the fact that Section 2320 U. S. Rev. Stat. provides that

“No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.”

The Act of August 1st, 1912, contains substantially the same provision as to the power of attorney, the language being:

“That no person shall hereafter locate any placer mining claim in Alaska as attorney for another, unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded,” etc. (Sec. 129-b, Compiled Laws of Alaska, 1913.)

With this almost identical language, the only reason for applying a different rule to the Wickersham Act must be found in Section 129-e, which reads:

“That any placer mining claim attempted to

be located in violation of this act shall be null and void," etc.

Can it be said that a person who marks the exterior boundaries of a mining claim so that the boundary line can be readily traced, before making any discovery of mineral within the boundaries of the claim, has violated Section 2320 U. S. Rev. Stat.? We submit that the rulings of the courts are unanimous in their support of the proposition that it is immaterial in locating a mining claim which act precedes, the discovery of mineral or the marking of the boundaries of the claim, if both acts are completed before the rights of others intervene. Yet Section 2320 U. S. R. S., *supra*, provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." If location prior to discovery is a violation of that section of the statute, then it must be admitted that the courts have recognized the validity of a mining claim, although located in violation of law. Can it be said that if Section 2320 U. S. R. S., *supra*, had contained the forfeiture clause of the Wickersham Act, that the courts would have held that because a locator had marked the boundaries of his claim prior to dis-



covery, he had violated the terms of the Act and his location was thereby rendered null and void?

The question necessarily arises whether the acts performed by Gates for Purdy were "in violation of this act." If not in violation, then they were not "null and void." We must remember that these acts were performed prior to the time when the territorial act of April 30th, 1913, went into effect, and under the rule stated in *Sturtevant vs. Vogel* (167 Fed. 452), record of location notice was unnecessary. The only acts necessary to a valid location by defendant were discovery and marking of the boundaries. Did Gates violate the Wickersham Act by making a discovery prior to the record of his power of attorney? Manifestly not. Was his staking of the ground prior to the record of the power of attorney "in violation of this act"? We contend not. It would be a violation of the Wickersham Act if he attempted to locate more than two placer mining claims for Purdy during any calendar month, for such is expressly prohibited by the Act. For the same reason it would be a violation of the Wickersham Act if Gates attempted to locate more than two placer mining claims for himself in

any calendar month, but surely he did not violate the act by making the discovery, or even by marking the boundaries, for the very good reason that *the act does not prohibit his doing either*, while it does prohibit him from making more than two placer mining locations in any calendar month.

The Legislature of Alaska recognized this distinction in the Act of April 20th, 1913 (Session Laws of Alaska of 1913, p. 289). Sections  $12\frac{1}{4}$  to  $12\frac{3}{4}$  limit the size of the association placer mining claims, and the number of claims which may be located by any person. Sections 14 to 17 inclusive of that Act require the locator to do certain things, such as posting notice, marking boundaries, and recording. Section 18 treats any attempted location in excess of the area allowed as a violation of the Act, but a failure to properly post or record notice as merely a non-compliance with the Act. Note the language of that section:

“If the discoverer of any placer deposit fails to comply with any of the provisions of Sections 14, 15, 16 and 17, within the time therefor specified, all right to appropriate any portion of the public domain by reason of his discovery shall cease, and any placer mining claim attempted to be located in violation of Sections  $12\frac{1}{4}$ ,  $12\frac{1}{2}$  and  $12\frac{3}{4}$ , or any

of them, shall be null and void, and the area thereof may be located by any qualified locator as if no such previous attempt had ever been made."

The Legislature drew a clear distinction between a violation of the law and a non-compliance with it. The distinction is clear and explicit, and allows the locator nothing in either event.

The Wickersham Act contains no such provision. It simply declares that locations attempted in violation of the act shall be null and void. It is clear that an attempt to locate more than two placer mining claims in any calendar month would be in "violation of this Act," and we submit that it is equally clear that the making of a discovery or marking of the boundaries prior to the record of a power of attorney is not in "violation of this Act" for the very sufficient reason that the act did not prevent Gates from making a discovery or even from marking the boundaries of the claim he was locating for Purdy. We submit this reasoning is absolutely correct. Even if technical, still it is technically correct, and should be followed strictly in this case for the reason that forfeitures are abhorrent to the law. We need not refer to the various cases in which this court has held that such

forfeitures will be strictly construed. We submit that the acts performed by Gates prior to the record of his power of attorney from Purdy cannot be held to be "in violation of this Act," unless the court will undertake to read into the law something not contained in its express provisions. In other words, this court must at least supply the defects in the law and enlarge upon it in order to declare a forfeiture in this case, and this despite the well established rule that forfeitures must be strictly construed.

Secondly, we submit the plaintiff must recover on the strength of his own title and not on the weakness of his adversary. The testimony in the record is insufficient to show that a proper notice was posted on the ground and that manifestly the recorded notice is not in compliance with the territorial law. The notice recorded by the plaintiff in error is in the record (Tr. pp. 323-324), and we submit that it fails to comply with the territorial law in that it lacks a sufficient "description of the location of such claim with reference to some natural object, permanent monument or well known mining claim; and the description of the boundaries,



corner monuments and markings thereon." (Sec. 10, Session Laws of 1913, p. 288).

In this connection we refer to the recent decision of this court *In re Cloninger vs. Finlaison* (230 Fed., 98). It was there held that the description of the claim as "No. 1 Bear Creek Placer Mining Claim" situated in the White River Mining District, and that "Bear Creek is a tributary to Big Eldorado" is not sufficient. This is substantially the same description contained in the recorded notice of the plaintiff in error, except that he adds that the claim is situated between Nelson's No. 2 and Bell's No. 3. There is nothing to show, however, that these are "well known mining claims." They could not be, for the testimony in the record shows that the district was newly discovered, and that all of the locations there were made within a month or six weeks prior to plaintiff's location.

A still more serious defect occurs in that plaintiff's recorded notice wholly lacks any "description of the boundaries, corner monuments, and markings thereon." A brief description of the boundaries is given as running from initial point to stake No. 1, Stake No. 2 etc., but there is no description given

of those "corner monuments and markings thereon." The language of the territorial act specifically requires this description. Will this court ignore the same, especially in a location made by a "jumper," or a person who is seeking to take advantage of the technical defects of a prior location? The record clearly shows that the defendant was first in point of time, and was in absolute good faith. Gates was one of the men who revealed the Shushana diggings to the world, and was attempting to make a location for Purdy, who had furnished him funds with which to make the trip for that purpose. The defendant in error is entitled to all the advantage which goes with the "first stakes." There is absolutely no question about his good faith or priority in point of time. This is entitled to the same consideration from this court as was given it by the Alaska court. The plaintiff seeks to take advantage of technical defects of the location made for the defendant, and the court should be at least equally technical in passing upon the location made by the plaintiff in error. The language of the territorial act requires him to give a description of the "corner monuments and markings thereon." In this his recorded location notice is wholly lacking, and that defect was

held fatal by the Supreme Court of the United States *In re Butte City Water Company vs. Baker*, (196 U. S., 49 Law Ed., 409). That case was first passed upon by the Supreme Court of the State of Montana (28 Mont., 222, 72 Pac., 617, 104 Am. Stat. Rep. 683). The specific defect charged against the recorded notice was that it did not contain a description of the corner monuments and markings thereon, as is required by the Montana Statutes. The Supreme Court of Montana said:

“We have examined this notice of location, and are satisfied that it does not conform to the statute of the state of Montana, or with the construction thereof by this Court in the case of *Purdum vs. Laddin*, 23 Mont., 387, 59 Pac., 153. The question as to the right of the Legislature to provide rules for the marking of the boundaries of mining claims, and providing for a record of such location, and what the recorded paper must contain, has so long been recognized in this state, and has so many times been approved, by this court, that it would be useless to enter again into any consideration of the questions so decided.”

We quote the following from the *syllabus* in the case of *Purdum vs. Laddin*, cited in the last case:

“Under Pol. Code, Sec. 3612, providing that the declaratory statement containing a description

of a mining claim filed with the county clerk must contain the location and description of each corner, with the markings thereon, a statement describing a claim by metes and bounds, and giving no description of the corners or the markings thereon, is invalid."

Now, that is precisely the defect which was charged against the notice of location recorded by the plaintiff in error. It is the same defect which the Supreme Court of Montana held fatal, and its ruling received the approval of the Supreme Court of the United States. Surely this court will not pass lightly over the same defect in this case, precisely the same failure to comply with the laws of Alaska. It cannot do so in the light of its decision *In re Cloninger vs. Finlaison, supra*. It cannot do so without disregarding the decision of the Supreme Court of the United States. Especially it should not do so in this case, wherein the plaintiff in error is himself seeking to take advantage of the technical defects of a prior locator, and to deprive him of the fruits of his discovery. This court is perhaps not compelled to give consideration to the fact that the recorder was absent from the district when the defendant's discovery was made and the claim staked for him. The stern rules of law may justify



or even demand that the defendant suffer this injustice; that he forfeit the fruits of his toil to one who comes later and profits by the defendant's discovery, but surely the plaintiff is not warranted in asking that the rule of strict construction relative to forfeitures be liberalized in this case in his favor. If that part of this motion be denied, then we contend for an equally strict construction as to the notice recorded by the plaintiff in error. He has wholly failed to comply with this particular requirement of the territorial law then in force, a failure which the Supreme Court of the United States held fatal, and which we respectfully submit must be held fatal by this court in the case at bar.

Thirdly, if this court reverses the ruling of the trial court and sets aside the judgment, it should refuse to direct the entry of a judgment by the trial court, but should order a new trial. The plaintiff in error prays judgment against the defendant for damages for withholding the possession of the ground in controversy. The defendant in error is entitled to have the verdict of a jury upon this claim, and upon all of the other issues raised. The jury must also pass upon the question as to whether

or not the plaintiff posted a sufficient notice, properly marked the boundaries of his claim, and recorded his notice, all as required by the territorial act of 1913, which went into effect subsequent to defendant's location, but some thirty days prior to plaintiff's alleged location. The defendant is entitled to have the verdict of the jury upon the sufficiency of the evidence as to the posting of notice upon the ground, and the performance of all the acts required in that connection. This is necessary, even though conceding a valid discovery and proper staking; the defendant is entitled to have the verdict of the jury upon that question as well as upon the question of damages.

We submit, therefore, that the defendant completed all of the acts constituting a valid location prior to the plaintiff's alleged location; that he did not violate the Wickersham Act by locating the claim through his agent who had failed to record his power of attorney prior to location, but who did record his power of attorney prior to plaintiff's alleged location; that the location of the mining claim by the agent of the defendant prior to the recording of the power of attorney was not a violation of the Wickersham Act, but merely a non-

compliance therewith, and the forfeiture clause of the Wickersham Act does not apply to a non-compliance with the Act, but to an actual violation of the Act; but even if the court should conclude that the defendant's title is defective, it cannot reverse the judgment of the trial court unless it finds that the plaintiff has a perfect title, and we submit that the plaintiff's title is fatally defective because the location notice does not comply with the territorial law. But if the court concludes that the case should be reversed, then we submit that the court should remand the case and order a new trial.

MAURICE D. LEEHEY,  
Attorney for Defendant in Error,  
Alaska Building,  
Seattle, Washington.

LYONS & ORTON,  
Of Counsel.





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

POLSON LOGGING COMPANY, a Corporation,  
Plaintiff in Error,  
vs.

GUSTAVE H. NEUMEYER and ABRHAM J.  
DIMOND, Copartners Doing Business Under  
the Name and Style of NEUMEYER &  
DIMOND,  
Defendants in Error.

---

Transcript of Record.

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Upon Writ of Error to the United States District  
Court of the Western District of Washington,  
Southern Division.

Filed

APR 20 1915

F. D. Mondragon,  
Clerk.



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

POLSON LOGGING COMPANY, a Corporation,  
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Defendants in Error.

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---

Upon Writ of Error to the United States District  
Court of the Western District of Washington,  
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**Names and Addresses of Attorneys.**

JOHN W. ROBERTS, Esquire, #1304 Alaska  
Building, Seattle, Washington, and

NELSON R. ANDERSON, Esquire, #1304 Alaska  
Building, Seattle, Washington,

Attorneys for Plaintiffs and Defendants in  
Error.

J. B. BRIDGES, Esquire, Aberdeen, Washington,  
and

THEODORE B. BRUENER, Esquire, Aberdeen,  
Washington,

Attorneys for Defendant and Plaintiff in  
Error. [1\*]

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*In the United States District Court for the Western  
District of Washington, Southern Division.*

No. —.

POLSON LOGGING COMPANY, a Corporation,  
Plaintiff in Error,

vs.

GUSTAVE H. NEUMEYER, and ABRHAM J.  
DIMOND, Copartners, Doing Business Under  
the Name and Style of NEUMEYER & DI-  
MOND,

Defendants in Error.

**Praecipe for Transcript.**

To the Clerk of the Above-entitled Court:

You will please prepare and certify to constitute

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\*Page-number appearing at foot of page of original certified Record.

the transcript of record in the above cause, type-written copies of the following papers, omitting all captions, verifications, acceptances of service and other endorsements, excepting file marks. I hereby waive the provisions of the Act of February, 1911, in reprinting of transcripts on appeal:

1. Complaint;
2. Answer;
3. Reply;
4. Judgment;
5. Motion for Judgment Notwithstanding Verdict;
6. Order Denying Above Motion;
7. Motion for New Trial;
8. Order Denying Above Motion;
9. Order Extending Time for Filing Bill of Exception;
10. Bill of Exceptions and Order Settling;
11. Petition for Writ of Error and Allowance;
12. Assignments of Error;
13. Bond on Writ of Error and Approval;
14. And that no exhibits be copied but that the original exhibits be sent to the Circuit Court of Appeals with the transcript, for the examination of that Court.

BRIDGES & BRUENER,

Attorneys for Plaintiff in Error.

(Filed Feb. 2, 1915.) [2]

*United States District Court, Western District of  
Washington, Southern Division.*

No. 1507.

GUSTAVE H. NEUMEYER, and ABRHAM J.  
DIMOND, Copartners, Doing Business Under  
the Name and Style of NEUMEYER & DI-  
MOND,

Plaintiffs,

vs.

POLSON LOGGING COMPANY, a Corporation,  
Defendant.

**Complaint.**

Plaintiffs, for cause of action against defendant,  
allege:

I.

That Gustave H. Neumeyer and Abrham J. Dimond, at all times hereinafter mentioned, were, and are now copartners doing business under the name and style of Neumeyer & Dimond; that their principal place of business is in New York City, State of New York; that under the laws of New York they are competent and qualified to maintain this action.

II.

That Polson Logging Company, at all times hereinafter mentioned, was and is now a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal place of business at Hoquiam, Washington.

## III.

That plaintiffs, at all times hereinafter mentioned were and now are citizens and residents of the State of New York; that defendant, at all times hereinafter mentioned, was and is now a citizen and resident of the State of Washington; that the amount involved in this controversy exceeds the sum of Three Thousand and no/100 (\$3,000.00) Dollars, exclusive of interest and costs. [3]

## IV.

That on or about the 11th day of September, 1912, defendant gave plaintiffs, and plaintiffs accepted from defendant, a certain order for goods, wares, and merchandise (a copy of which is hereto attached and marked "Exhibit A"), of the agreed and reasonable value of Three Thousand Eight Hundred Ninety-five and 39/100 (\$3,895.39) Dollars, and plaintiffs thereupon delivered to defendant said goods, wares and merchandise in accordance with said order at Hoquiam, Washington.

## V.

That defendant, although requested, refused and refuses to pay plaintiffs for the agreed and reasonable value of said merchandise, namely \$3,895.39, or any part thereof; that the same is due, owing and unpaid to plaintiff together with interest thereon at the rate of six per cent per annum from March 6th, 1913, being thirty days after date of shipment, until paid.

WHEREFORE, plaintiffs demand judgment against defendant in the sum of \$3,895.39, together with interest thereon at the rate of six per cent per



annum from March 6th, 1913, until paid and for their taxable costs and disbursements as provided by law.

JOHN W. ROBERTS,

NELSON R. ANDERSON,

Attorneys for Plaintiffs.

(Verification.) [4]

No. 2012.

Sept. 11th, 1912.

NEUMEYER & DIMOND, NEW YORK.

Enter our order for the following:

When Ship—Soon as possible.

Ship to—Polson Logging Company, Hoquiam, Washington.

Send bill to—Same.

- 3 bars  $1\frac{1}{2}$ "x $2\frac{1}{2}$ " Swivel Steel
- 2 bars each 2" Rd. 1-3/8" Rd. Clevis Steel
- 1 "  $2\frac{1}{4}$ " Round Swivel Eye Steel
- 7 "  $1\frac{1}{4}$ x $4\frac{1}{2}$ " Chaker Hook
- 2 bars each  $1\frac{1}{4}$ " Rd.- $2\frac{1}{2}$ " Rd. Block Hook Steel
- 2 "  $2\frac{1}{4}$ " Round Line " "
- 2 " 5/16"x14" Block Side Steel
- 2 " 2-3/4" □ Sledge Steel
- 2 " 2" Rd- $2\frac{1}{2}$ " Rd-1-13/16" Rd Piston Rod  
Steel
- 1 "  $1\frac{1}{4}$ " Round Valve Rod
- 1 " 7/16"x $3\frac{1}{2}$ " Locomotive Spring Steel
- 25 " 1"x2" Dog Hook Steel
- 1 " 5/8" Oct. 2 bars 3/4" Oct. Cold Chisel
- 2 " " 2" □  $1\frac{1}{2}$ " □ 1-3/8" □  $1\frac{1}{4}$ " □ Track  
& Bull Chisel
- 1 " 3" □ Splitting wedge steel
- 12 " " 1"x3" Falling & Bucking wedge

12 “ “ 7/8 Rd.-1" Rd-1-1/8" Rd-1-1/4" Rd  
Cold Shut

50 “ 3/4" Round

2 “ 1" “ Roller Bearing Steel

250 ft. 1 1/4"x6" Draw Head Steel

bars 20 ft. long cut in two at 12 1/2¢ lb.

8 ft. each 3" □ 4" □ Die Steel (Ann.) 17¢ lb.

F. O. B., Hoquiam, Wash.

Polson Lg. Co. Order #653 as per copy left with  
us of this order. [5]

Terms 2% 10 days, 30 days net.

Signed POLSON LOGGING CO.

J. C. SHAW.

(On one side of sheet): This order is taken subject  
to delay in delivery caused by strikes, differences  
with workmen, serious fires, accidents to machinery,  
or other causes unavoidable or beyond our control.

(4158)

[Endorsed]: “Filed in the U. S. District Court,  
Western Dist. of Washington, Southern Division.  
Jan. 20, 1914. Frank L. Crosby, Clerk. By F. M.  
Harshberger, Deputy.” [6]

---

### **Answer.**

Comes now the defendant and answers the plain-  
tiffs' complaint as follows:

#### **I.**

Answering the allegations contained in paragraph  
I of the complaint, the said defendant has not knowl-  
edge or information sufficient to form a belief as to  
the truth thereof and therefore denies the same and

each and every one thereof.

II.

Answering paragraph 2 of the complaint, defendant admits the same.

III.

Answering paragraph 3 of the complaint, defendant admits the last five lines of said paragraph, and in answer to the first two lines of said paragraph, defendant says that it has not knowledge or information sufficient to form a belief as to the allegation contained in said two lines and therefore denies the same.

IV.

Answering paragraph 4 of the complaint, defendant denies the same and each and every allegation, matter, statement and thing therein contained.

V.

Answering paragraph 5 of the complaint, defendant denies the same and each and every part thereof, and more particularly denies that there is due and owing from the said defendant to the said plaintiffs, the sum of \$3,895.39 or any sum whatsoever.

As a further and first affirmative defense, defendant alleges: [7]

I.

That it is a corporation organized under the laws of the State of Washington, having its principal place of business in the city of Hoquiam, and engaged in the logging business, with a large number of camps located a considerable distance from the city of Hoquiam, where its office is. That a day or two prior to the 11th day of September, 1912, a sales-

man, representing himself to be the agent of the plaintiffs in this cause, came to the office of the defendant company and then and there solicited one J. C. Shaw, the bookkeeper of the defendant, for an order for steel for defendant's camp; that no order was given to the said salesman, and the salesman then requested of the said Shaw, permission to go to the camps of the said defendant company, and for a pass over the railroad lines of the defendant company, for the purpose of transporting him to camp; that it is one of the rules and regulations of the said defendant company and one of its customs, well known at that time to the said salesman, that no person was permitted to ride on the trains of the said defendant company for any purpose whatsoever, without a pass first had and obtained from the said office, entitling such person to ride on said defendant's trains. That such pass was refused, and that after such refusal, the said salesman, in a manner unknown to the said defendant, and without any permission on its part, went to the main camp of the said defendant company and then and there falsely represented to the superintendent of said camps and to the head machinist in said camp, that he, the said salesman, had been sent to said camp by the office at Hoquiam, Washington, for the purpose of getting the sizes of steel that they used in their railroad work, and for the purpose of finding out what steel, if any, was required; that the said head machinist and the said superintendent, relying upon such [8] false representations, showed the said salesman around the camp and more particu-



larly went through the machine-shop with him and explained to him the sizes of steel used in the camp, and in general gave the said salesman such information with reference to steel and the uses thereof and the requirements of the camp, that the said agent requested and asked for. That the said salesman thereafter and, to wit, on the 11th day of September, 1912, again presented himself at the office of the said defendant and more particularly to the said J. C. Shaw, the bookkeeper, and then and there represented to the said Shaw, that he had been up to the camp of the defendant company, and then and there falsely represented to the said Shaw that the superintendent and machinist of said camp had given him certain sizes of steel which the said camp was in need of, and falsely represented that the steel sold by his firm was manufactured by the said plaintiffs, and then and there requested an order for steel. That thereupon, the said Shaw, the bookkeeper of the said defendant, acting without any authority or knowledge on the part of the said defendant company or its officers, relying upon the false and fraudulent representations so made by the said salesman, and believing the statements so made by the said salesman to be true (whereas in truth and in fact, said statements and representations were false), gave the said salesman an order for an amount of steel materially less than the amount shown on the alleged order sued on, the same to be delivered at Hoquiam, Washington, f. o. b., and then and there, under the circumstances mentioned, signed the name of the defendant company by himself, to an order

for such small amount of steel; that such order, or any order that was obtained on said day from the said Shaw, signing on behalf of the said defendant company, was obtained by the said salesman [9] through the false and fraudulent representations made and through the false and fraudulent conduct of the said salesman as hereinafter explained.

WHEREFORE having fully answered, the said defendant prays that this action may be dismissed and that it may recover its costs and disbursements herein.

BRIDGES & BRUENER,  
Attorneys for Defendant.

(Verification.)

(Filed Feb. 27, 1914.) [10]

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**Reply.**

Come now the plaintiffs herein and for reply to answer of the defendants say:

I.

Plaintiffs deny each and every allegation contained in the affirmative defense pleaded by defendants. Wherefore plaintiffs pray for judgment as in their complaint on file herein.

JOHN W. ROBERTS.  
NELSON R. ANDERSON.

(Verification.)

(Filed Mar. 16, 1914.) [11]

**Verdict.**

We, the jury empaneled in the above-entitled cause, find for the plaintiffs and assess their damages at the sum of Thirty-eight Hundred Ninety-five 39/100 Dollars (\$3,895.39/100) at six per cent interest from March six, 1913.

GEO. A. MORRISON,

Foreman.

Filed Sept. 26, 1914. [12]

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**Judgment.**

This matter coming on regularly for trial before the Honorable Edward E. Cushman, one of the Judges of the above-entitled court, on the 24th, 25th and 26th days of September, 1914, plaintiffs being present by their attorneys, John W. Roberts and Nelson R. Anderson, and defendant being present by its attorneys, Bridges & Bruener; a jury having been regularly empaneled and evidence having been propounded by both parties hereto, and a verdict having been rendered by the jury upon said evidence and under the instructions of the Court in the amount of Three Thousand Eight Hundred and Ninety-five and 39/100 (\$3,895.39) Dollars, together with interest thereon at the rate of six per cent per annum from March 6th, 1913, until paid, and the Court being duly advised in the premises, it is

ORDERED, ADJUDGED AND DECREED, that Gustave H. Neumeyer, Abraham J. Dimond, and William E. Neumeyer, copartners, doing busi-

ness under the name and style of Neumeyer & Diamond, plaintiffs, do, have and recover of the Polson Logging Company, a corporation, defendant, the sum of Four Thousand Two Hundred and Sixty-seven and 38/100 (\$4,267.38) Dollars, together with interest thereon at the rate of six per cent per annum from date hereof, until paid and the sum of One Hundred Forty-four and 80/100 (\$144.80) Dollars, costs herein to be taxed by the clerk of the above-entitled court, together with the taxable costs and disbursements as provided by law.

Done in open court this 9th day of October, 1914.

EDWARD E. CUSHMAN,

Judge.

(Filed Oct. 9, 1914.) [13]

---

**Motion for Judgment Notwithstanding the Verdict.**

Comes now the defendant and moves the Court for judgment in its favor, notwithstanding the verdict of the jury rendered in the above-entitled cause.

BRIDGES & BRUENER,

Attorneys for Defendant.

(Filed Sept. 30, 1914.) [14]

---

**Order Striking Defendant's Motion (for Judgment Notwithstanding the Verdict).**

This matter coming on regularly for hearing before the above-entitled court and the Honorable Edward E. Cushman, one of the Judges thereof, on the 30th day of November, 1914, plaintiffs appearing by their attorneys Nelson R. Anderson, and John



W. Roberts and defendant appearing by its attorneys, Bridges & Bruener, and the Court being duly advised in the premises, it is hereby

ORDERED that said motion for judgment *non obstante veredicto* be, and the same hereby is, stricken.

Done in open court this 4th day of December, 1914.

EDWARD E. CUSHMAN,

Judge.

(Filed Dec. 4, 1914.) [15]

---

**Motion for New Trial.**

Comes now the defendant and moves the Court to grant a new trial herein, for the following causes materially affecting the substantial rights of the said defendant, to wit:

I.

Insufficiency of the evidence to justify the verdict and the judgment, to wit:

A. Failure on the part of the plaintiffs to prove that they delivered to the said defendant goods, wares and merchandise of the kind, character and description called for by the contract sued on, and in accordance with said contract.

B. The evidence in the case conclusively shows that the plaintiffs did not deliver or tender delivery to the defendant, goods, wares, and merchandise *or* the kind character and quality and description called for by the contract sued on, and in accordance with said contract.

## II.

Error in law occurring at the trial, to wit:

A. Refusal of the Court to grant defendant's motion challenging the sufficiency of plaintiff's evidence, at the close of plaintiff's case, and its motion for a directed verdict at said time.

B. Refusal of the Court, at the close of all the testimony, to grant defendant's motion for a directed verdict.

C. The admission by the Court, over defendant's objection, permitting William Neumeyer, one of the plaintiffs, to testify in rebuttal, what amount and [16] what kinds of steel other logging companies in different parts of the State of Washington, Idaho, and other states, used and were using; what amount and kind of steel other logging companies in said states, purchased from the said plaintiffs; and that the witness knew, by reason of such sales and such purchases, that the order sued on was a small order for a concern like the Polson Logging Company, and that such order would be used up by said company within a year.

D. Refusal of the Court to give defendant's requested instruction No. 3, in its entirety.

E. Refusal of the Court to give defendant's requested instruction No. 4.

F. Refusal of the Court to give defendant's requested instruction No. 5.

G. Refusal of the Court to give defendant's requested instruction No. 6.

BRIDGES & BRUENER,

Attorneys for Defendant.

**Order Denying Defendant's Motion for New Trial.**

This matter having come on regularly for hearing before the above-entitled court and the Honorable Edward E. Cushman, one of the Judges thereof, on the 30th day of November, 1914, plaintiffs being present by their attorneys, Nelson R. Anderson and John W. Roberts, and defendant being present by its attorneys, Bridges & Breuner, and the Court having heard the argument of counsel and being duly advised in the premises, it is hereby

ORDERED that defendant's motion for a new trial be, and the same is hereby, denied. Defendant excepts and his exception is allowed.

Done in open court this 4th day of December, 1914.

EDWARD E. CUSHMAN,

Judge.

(Filed Dec. 4, 1914.) [18]

---

**Order [Extending Time for Filing Bill of Exceptions].**

On motion of defendant in the above-entitled cause, it appearing that there is good cause for such action,

IT IS ORDERED that said defendant have until December 20th, 1914, within which to draw up, serve and file its Bill of Exceptions in said cause.

Done in term time this 23d day of November, 1914.

EDWARD E. CUSHMAN,

Judge.

(Filed Nov. 24, 1914.) [19]

**Notice of Filing of Bill of Exceptions.**

To John W. Roberts and Nelson R. Anderson, Attorneys of Record for Neumeyer & Dimond, Plaintiffs:

You and each of you will please take notice that the defendant in the above action has filed with the clerk of the above court its Bill of Exceptions to the rulings of the Court in the trial of the above cause, and now serves a copy of the same upon you.

And you are further notified that said defendant will present said Bill of Exceptions to the Honorable E. E. Cushman, at the courtroom of said court, in the city of Tacoma, Pierce County, Washington, on Saturday, the 19th day of December, A. D. 1914 at the hour of 10 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, and will ask the Judge of said court to settle and sign said Bill of Exceptions.

A copy of an order made on the 24th day of November, 1914, by the Honorable E. E. Cushman, Judge of said court, giving the said defendant until the 20th day of December, 1914, within which to draw up, serve and file its proposed Bill of Exceptions in said cause, is herewith also served upon you.

**BRIDGES & BRUENER,**

**Attorneys for Defendant.**

We hereby acknowledge service of the above Notice, copy of Order and said Bill of Exceptions, after



filing, at Seattle, Washington, this 8 day of December A. D. 1914.

JOHN W. ROBERTS,  
NELSON R. ANDERSON,  
Attorneys for Plaintiffs. [20]

---

**Statement of Fact.**

BE IT REMEMBERED that heretofore and upon, to wit, the 24th day of September, A. D. 1914, this cause came on regularly for hearing before the Hon. E. E. Cushman, Judge of the above-entitled court, and a jury;

The plaintiffs being represented by their attorneys and counsel, John W. Roberts, Esq., and Nelson R. Anderson, Esq.; and

The defendant being represented by its attorneys and counsel Messrs. Bridges & Bruener.

Whereupon the following proceedings were had and done, to wit: [21]

The plaintiffs herein, to maintain the issues on their part, introduced the following evidence:

(Opening statement of court and jury by Mr. Roberts:)

**[Testimony of M. S. Sulcove, for Plaintiffs.]**

M. S. SULCOVE, a witness produced on behalf of the plaintiffs herein, being first duly sworn, testified as follows, to wit:

**Direct Examination.**

(By Mr. ROBERTS.)

Witness testified that he was a salesman in the employ of Neumeyer & Dimond, and had been in

(Testimony of N. S. Sulcove.)

their employ for a period of ten years, and covered part of the southwest of the Pacific Coast and part of the middle northwest; that he first called on the Polson Logging Company in September, 1910, and saw Mr. Shaw, the purchasing agent; that Mr. Shaw was not in the market for steel at that time, and witness saw him again in 1911, at the same place, and Shaw again said that his company was not in the market for any steel, saying that his concern has just received a carload thereof. Witness went back in 1912 and saw Mr. Shaw again at the same place, and the latter told the witness that he was not in the market for any steel; that witness requested permission to go to the camps of the Polson Logging Company and Mr. Shaw told witness how to get there, and said: "You will see Mr. Brown or Mr. Kline there," and witness said that Shaw took the back of witness' card and wrote the names of Brown and Kline on this card. Witness said he was going to camp the next morning, and Shaw promised to telephone that evening to Brown and Kline, telling them that witness was coming to camp. The next day there being an election, witness did not go up to camp, but went the following day, getting into camp by means of the logging railroad of the defendant, and succeeded in passing the conductor of the train by means of the card which Shaw had given him. At camp witness saw Mr. Brown and Mr. Kline, and witness said that he [22] went over all of the requirements, sizes and everything, with these two gentlemen, who are the head machinist

(Testimony of N. S. Sulcove.)

and the superintendent of the camps, respectively; witness took down all the specifications on a slip of paper. Witness got back to town that afternoon, saw Mr. Shaw at the office, showed him the list which he had gotten in camp, and Shaw told him to come back in the morning. He went back in the morning and Shaw gave witness the defendant's next order number and signed the order sued on. Plaintiff's Exhibit No. 1 was then shown witness, properly identified, and introduced in evidence as Plaintiff's Exhibit No. 1. Witness identified the signature of Mr. Shaw to this order; that the order was the original order and that no change had been made in the order from the time it was written and signed up to the time of the trial. Witness testified that he had never seen the steel and did not attend to the shipping; that a copy of the order was left with Mr. Shaw at the time; that witness saw Mr. Shaw and the Polsons a year later and after the trouble had arisen over *of* the order, and tried to straighten out the difference, but was unsuccessful.

Cross-examination.

(By Mr. BRUENER.)

Witness testified that he had nothing to do with the manufacturing or shipping of any orders in any way whatsoever; that Mr. Shaw gave him authority to go to camp, but did not give him a pass on the railroad; that he told Mr. Brown, the head machinist, and Mr. Kline, the superintendent, that he had been sent up to the camp by the office for the purpose

(Testimony of N. S. Sulcove.)

of finding out what the camp wanted, what they used and what they needed.

“Q. Now, the information with reference to the number of bars that appear on that order, and with reference to the sizes that appear on that order, and with reference to the lengths of the bars which appear on that order, and with reference to all of the specifications on that order, you got at camp?

A. Yes, sir. [23]

Q. Now, Mr. Shaw did not give you any of these specifications? A. No, sir.

Q. In other words, Mr. Shaw gave you that order, and the specifications on that order were all obtained at the camp? A. Yes, sir.

Q. Say, for example, this item: Seven bars of Choker Hook Steel? A. Yes, sir.

Q. And the number of bars wanted?

A. Yes, sir.

Q. And the sizes wanted? A. Yes, sir.

Q. Those were given to you in camp?

A. Yes, sir.

Q. Twenty-five bars of 1x2 Dog-Hook Steel?

A. Yes, sir.

Q. That was given to you? A. Yes, sir.

Q. All of those bars were to be twenty feet long, cut in two? A. Yes, sir.

Q. And you got your specifications with reference to the length from Mr. Kline and Mr. Brown?

A. Yes, sir.

Q. The last two items on the order were to be eight feet each? A. Yes, sir.”



(Testimony of N. S. Sulcove.)

That witness traveled over the camp and came into the machine-shop and the other shops at the camp, with a pad and pencil, and took down all of the sizes and specifications that were given him by Brown and Kline.

“Q. Now, did they specify also the different kinds of steel wanted, so many bars of Swivel Steel, Choker, Clevis, Swivel [24] Eye, Choker Hook, and Piston Rod Steel?

A. Yes I marked it exactly as they gave it to me.

Q. In fact, they specified feet, description, number of sizes, length of bars, and the kind, whether Piston Rod or Draw Head Steel, that they wanted and that they said that the camp needed?

A. Yes, sir.”

That the order was obtained by him in absolute good faith, in the regular way, and that Mr. Shaw was given a copy at the time.

A copy of an order-book such as witness used in taking this particular order was identified as Defendant's Identification “A.”

**[Testimony of William E. Neumeyer, for Plaintiffs.]**

WILLIAM E. NEUMEYER, a witness produced on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ROBERTS.)

Witness' name is William E. Neumeyer; residence, New York City; business, the steel business. That the firm of Neumeyer & Dimond is a copartnership

(Testimony of William E. Neumeyer.)

authorized to do business in the State of New York as a copartnership, and that this concern has been in the steel business for generations; that one year after the order was obtained he went to Hoquiam and called upon the Polson Logging Company for the purpose of adjusting the difference with reference to the order; that he then and there had a talk with Mr. Shaw with reference to the order; he said that he could not do much personally, but would have to talk it over with Mr. Robert Polson; Mr. Robert Polson told him the same thing; Mr. Alexander Polson was out of town and could not be seen that trip. Later and on a subsequent trip, he saw Mr. Alexander Polson and tried to adjust the matter with him and Mr. Alexander Polson told him that the order was not gotten in good faith and no adjustment was reached. [25]

Q. Did you see this steel when you were down there?

A. Yes, I went to the freight depot and talked to the freight agent, and saw the bill of lading, and I saw the steel.

Q. And that steel was shipped in accordance with this order in court? A. Exactly.

Mr. BRUENER.—I object to that as not being the best evidence. Objection overruled. Exception allowed.

Q. Now, Mr. Neumeyer, you have made the computations, have you not, and you know what that amounts to in accordance with the prices which are named on the order (counsel handing paper to wit-

(Testimony of William E. Neumeyer.)  
ness). Give the jury the exact amount.

A. The exact amount of the bill is three thousand eight hundred ninety-five dollars and thirty-nine cents.

Q. Now, I will ask you to state, Mr. Neumeyer, whether or not the price of that steel is named on that order, whether that was the correct price for the steel.

A. Exactly the price for the steel by the pound, twelve and one-half cents, that is the exact price.

Q. I notice there is one bar, or one piece—(Interrupted.)

A. There is one item, eight feet each three-quarter inch square die steel, a special steel, which has to be annealed, which is a little higher in price, seventeen cents per pound.

Q. Now, you are engaged in selling your steel generally on the Pacific Coast.

A. We are selling our steel all over the United States.

Q. Well, I know, but as a part of the United States, you are selling on the Pacific Coast.

A. Yes, sir. [26]

Q. What is the extent of your business on the Pacific Coast?

Mr. BRUENER.—I object to that as being immaterial. Objection overruled. Exception allowed.

A. Do you mean what products? What steel on the coast?

Q. Each year, yes, sir.

A. We come out here every year, about August,

(Testimony of William E. Neumeyer.)

September, and October, and we sell on the average of about one hundred twenty-five thousand dollars worth of steel.

Cross-examination.

(By Mr. BRUENER.)

Q. Now, the only time you saw that steel was at Hoquiam, Mr. Neumeyer.

A. At Hoquiam, when I wanted to be sure that the steel was there, and besides I wanted to talk to the freight agent—(Interrupted.)

Q. Just answer the question. The only time you saw the steel was in the warehouse and freight depot combined at Hoquiam? A. Yes, sir.

Q. It was there in the corner of the warehouse all piled up? A. Yes, sir.

Q. You did not make any examination of the steel in any way, just looked at it and saw it was still there, and Neumeyer and Dimond steel, and that is all you concerned your self about? A. Yes, sir.

Q. Now, where was that steel shipped from, do you know, Mr. Neumeyer?

A. From Tacony, Pennsylvania, near Philadelphia.

Q. That steel was shipped by Henry Ditson & Sons. A. Yes, sir.

Q. It was shipped to the Seattle Storage & Warehouse Company, or some such company?

A. That is what I do not remember. I am most of the time away from New York, and I do not know whether it was shipped direct [27] to the Polson Logging Company or not.



(Testimony of William E. Neumeyer.)

Q. You do not know whether it was shipped direct to Seattle and then to the Polson Logging Company.

A. I do not know. Sometimes we ship orders to Seattle to the Seattle Storage and Warehouse Company. In order to save the freight, we make up a carload for different orders and have it reshipped from the Seattle Transfer Company.

Q. Your name is Wm. E. Neumeyer?

A. Yes, sir.

Q. Are you a member of the firm of Gustav H. Neumeyer & Abraham J. Dimond?

A. Yes, since 1913, I am a member of that firm.

Q. You were not a member of the firm when this order was given?      A. Not yet.

Q. Were you connected with the business at that time?

A. No, sir, I was traveling, just the same as Mr. Sulcove was.

Q. You traveled in the capacity of a salesman?

A. Yes, sir.

Q. And you continued to travel in the capacity of salesman until January 1st, 1913? Is that correct?

A. I became a partner in the firm, but I am still traveling for the firm, just the same as I did before.

Q. So, you have nothing to do with the business end of it?      A. Not much.

Q. And your orders are sent in just the same as everybody else's orders are sent in?      A. Yes, sir.

Q. And you have nothing to do with the filling or shipping of orders?      A. No, sir. [28]

Witness further testified that the shipper of this

(Testimony of William E. Neumeyer.)

steel was Neumeyer & Dimond, but that Henry Diston & Company do the manufacturing; that the steel that is shipped by Neumeyer & Dimond is manufactured under the specifications prepared and furnished by Neumeyer & Dimond, and that Henry Diston & Co. cannot manufacture this steel for anybody else.

Q. When did this order first come to your attention, Mr. Neumeyer?

A. The order of the Polson Logging Company?

Q. Yes, this particular order.

A. That order first came to my attention in Portland when Mr. Sulcove came back to Portland in the year 1912, because I am out here with four or five boys, and I am kind of managing this trip, and we come in and talked conditions over, and I mailed these orders in to New York, and I saw that order the following Saturday after it was taken.

Q. When was the order next brought to your attention?

A. Not any more after I sent that order off to the main office in New York City.

Q. You had nothing more to do with the order, or the filling or the shipment of the order at all?

A. Nothing whatsoever.

Q. Then, the order was again sent to you, or you got it from the New York office in some way,—or did you have the order at all?

A. The second time I heard about this order was about around in January or February, while I was in New Orleans, that some steel had arrived at Ho-

(Testimony of William E. Neumeyer.)

quiam, and Mr. Polson said he did not order the steel, and the house wired it to me in New Orleans, and asked if I knew of any details of that order— (Interrupted.) [29]

Q. I am not anxious about that. The next time you had any active connection with the order was when you took it to Hoquiam and had these various talks with Mr. Shaw and Mr. Polson?

A. It was mentioned when I came back from a trip.

Q. But I say the only active thing you had to do with it was when you took the order and went to that office a year later. A. Yes, sir.

Redirect Examination.

(By Mr. ROBERTS.)

Plaintiff's Exhibits No. 2, 3, 4, 5, 6, 7, and 8 were admitted in evidence without objection from the defendant.

It was also admitted by the opposing attorneys that the steel arrived at Hoquiam about the middle of March 1912.

(Witness excused.)

Thereupon counsel for defendant, upon the demand of plaintiff's counsel, produced a number of copy books of the defendant company, which copy books were the letter or press files of orders sent out by the Polson Logging Co. Counsel for plaintiffs read from these copy books numerous letters in which the Polson Logging Co. ordered numerous and different articles for use in their business, all of said

copies showing the following signature: "J. C. Shaw, Buyer."

[Testimony of J. C. Shaw, for Plaintiffs.]

J. C. SHAW, being duly sworn, was called by the plaintiffs, testified as follows:

(By Mr. ANDERSON.)

Admitted that he had signed his name as J. C. Shaw, Buyer, [30] to the letters which counsel for plaintiffs had read to the jury. Witness was then shown other order books for the years 1911, 1912, and 1913, and witness admitted that he had sent out almost ninety-five per cent of these different orders, but it was not customary to sign any name to the orders and that anyone in the office would make out such orders if Mr. Shaw was away, or if directed to do so by either Mr. Alexander Polson or Robert Polson.

On redirect examination Plaintiff's Exhibit 9 was introduced without objection.

Thereupon the plaintiffs rested their case and counsel for defendant made the following motion: [31]

Mr. BRUENER.—If the Court please, I desire to challenge the sufficiency of the evidence of the plaintiffs upon the ground, upon the particular ground that there is not sufficient evidence before the Court, assuming that the order sued on was *bona fide* in every respect; and that it was given by Mr. Shaw, and that he gave it with authority, or, at least, apparent authority, to establish that the goods shown on that order were shipped in accordance with the order. That of course, is a prerequisite, and a part



(Testimony of J. C. Shaw.)

of plaintiffs' case, but I do not believe that the testimony of Mr. Neumeyer is sufficient upon that score. There is testimony, of course, that a car of steel,—that there is some steel in the warehouse at Hoquiam, but there is no direct, positive testimony that it complied with the order as given.

The COURT.—Motion denied. Exception allowed.

WHEREUPON, the defendant herein, to further maintain the issues on its behalf, introduced the following evidence:

(Opening statement to Court and jury by Mr. Bruener.) [32]

**[Testimony of Thomas D. Sharp, for Defendant.]**

THOMAS D. SHARP, a witness produced on behalf of the defendant herein, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BRUENER.)

Q. What is your name?

A. Thomas D. Sharp.

Q. You live in Hoquiam—this State?

A. Yes, sir.

Q. And your business is what?

A. Railroad agent.

Q. For what company?      A. Northern Pacific.

Q. How long have you been agent for the Northern Pacific Railway Company at Hoquiam?

A. Three years last August.

Q. Do you remember a shipment of steel consigned

(Testimony of Thomas D. Sharp.)

to the Polson Logging Company, arriving in Hoquiam some time in the early spring in 1913?

A. I do.

Q. Do you know exactly when that steel arrived?

A. Yes, sir. (Examining paper.) March 11, 1913.

Q. Now, that shipment was refused by the Polson Logging Company, was it? A. Yes, sir.

Q. Where has that steel been since that time?

A. In our warehouse at Hoquiam, or the Northern Pacific Railway Company's warehouse at Hoquiam.

Q. Where has it been piled in your warehouse?

A. In one end of the warehouse by itself. [33]

Q. Is that steel now in the same condition as it was when it was unloaded from the car? A. Yes, sir.

Q. In other words, whatever came out of the car is still in your warehouse?

A. Yes, the same steel is there in the warehouse that came out of the car.

Q. Have you the original way bill or freight bill showing from where that steel was shipped, and what was shipped?

A. Yes, it was shipped from Seattle.

Q. This is the original freight bill. (Handing paper to witness.) A. Yes, sir.

Q. And it is a part of the records of your office, Mr. Sharp? A. Yes, sir.

Mr. BRUENER.—I desire to offer this freight bill in evidence, if the Court please, as Defendant's Exhibit No. A.

No objection.

(Testimony of Thomas D. Sharp.)

(Whereupon said freight bill is admitted in evidence and marked Defendant's Exhibit "A," of this date.)

Q. Now, you would like to retain this original?

A. It is not absolutely necessary. I presume I can collect the charges on a copy.

By the COURT.—If you desire after the trial, a copy may be substituted.

Mr. BRUENER.—If you can make a copy at the noon hour, and give it to me, and compare it, then I will substitute that for the original.

Mr. ROBERTS.—That is satisfactory. [34]

By the WITNESS.—It has some of my notations on it as to when the shipper and the consignee were notified, so I would like to have it.

Mr. ROBERTS.—I do not think there is any question but what you have the steel. What is the storage against it? A. Forty cents per day.

Mr. BRUENER.—The railroad company is getting rich on this.

WITNESS.—We are afraid it will be left a little too long.

Witness excused. [35]

**[Testimony of George J. Flurshutz, for Defendant.]**

GEORGE J. FLURSHUTZ, a witness produced on behalf of the defendant herein, being first duly sworn, testified as follows;

Direct Examination.

(By Mr. BRUENER.)

Q. What is your name?

(Testimony of George J. Flurshutz.)

A. George J. Flurshutz.

Q. Do you live in Hoquiam?     A. I do.

Q. By whom are you employed?

A. F. G. Foster Company.

Q. What is their business?

A. Well, wholesale hardware and grocery concern.

Q. What part of that business have you charge of?

A. The hardware.

Q. What experience have you had in the hardware business?     A. Oh, I should judge sixteen years.

Q. As to a part of the hardware business, or as a part of your experience, have you had to deal with different sizes and kinds of steel and iron?

A. Yes, sir.

Q. As a part of your duties as manager of that department of the Foster Company, do you handle different kinds and sizes of steel and iron and other hardware?     A. Yes, sir.

Q. Now, I will ask you to state whether or not you ever examined Neumeyer and Dimond steel, so called, in the freight house or warehouse of the Northern Pacific Railway Company in the City of Hoquiam, Washington.     A. I did.

Q. When did you do that?     [36]

A. Why, I have really forgotten the exact date.

Q. I do not want the exact date, but was it within the last two weeks?     A. Oh, yes.

Q. Now, where was that steel?

A. It was in the freight-sheds, that is the warehouse of the depot, over at Hoquiam.



(Testimony of George J. Flurshutz.)

Q. Was it in a corner by itself, or with other material?

A. Yes, it was piled up in the end all by itself.

Q. Did you go over that steel to ascertain the number of bars that were in that shipment, and the length of the bars?     A. I did.

Q. How did you go about it?

A. Why, I got a number of fellows to go down there and handle the steel, and we got some scales and the pile being over here (indicating), we put the scales here (indicating), and we took one bar and put it on the scale and measured it for size, that is the different diameters, whether it was one and one-eighth inch shaft, for instance, or whatever it measured, and then it was piled over on the floor.

Q. As you took bar by bar and weighed it, did you take down the length of the bar as well as the weight?

A. Yes, we took the size of the bar, that is, if it was inch and one-*eight* around, in diameter, or whatever it was, we took the lengths of that bar, and the weight of that bar.

Q. Of course, that steel was all jumbled together, wasn't it?     A. Yes, sir. [37]

Q. That is, you could not get the bars that belonged to one particular shipment together?

A. No, sir; not without spreading it all around.

Q. But you took bar by bar, just as it came?

A. Yes, that is the first time I measured.

Q. Now, the weight that you found of the bars that are actually there, how do they compare with the

(Testimony of George J. Flurshutz.)

weights as shown on the bill, or invoice of Neumeyer and Dimond, which you see now.

Mr. ROBERTS.—If the Court please, I object to this. I do not know exactly what the purpose of this question is, but I want to call your attention to the fact that this shipment of steel was rejected before it was there. It was rejected by them before it arrived at Hoquiam, and rejected for the reason, and upon the ground that they had never ordered the steel; that no such order had ever been given. They had stood upon that ground, claiming that the order had never been given, either this or any other order, denying that our agent had ever even been there. Now, they have never at any time, either before the action, or now that the action has been instituted, made the claim that we did not furnish the steel in accordance with the order. That is a defense that would have to be pleaded, and it has not been pleaded, and in fact they are depending here upon a defense that is entirely inconsistent with any such a theory.

By the COURT.—I understand that they denied paragraph four of the complaint.

Mr. ROBERTS.—Probably they have, but the point is, your Honor, [38] that they cannot be allowed to make this inconsistent defense. In other words, they cannot defend here upon the ground that they did not order this steel, and then turn around and say that the order,—that they did order it, but it is not right, any more than I can plead that I never executed a promissory note, but if I did execute it,

(Testimony of George J. Flurshutz.)

I still have a certain defense. I do not know what the witness is going to testify to, but I assume it is for that purpose, but if that is true, then, their remedy would be one of two things, to either compel us to furnish—us to furnish the steel in accordance with the order, or recoup in damages. Furthermore this witness, by what authority I do not know, because Mr. Polson has constantly, under one phase of his denials, refused to have anything to do with the steel, and now he seems to have sent this man in there to take possession of it, for the purpose of counting and checking it up, but more than two years subsequent to the shipment of the order, or eighteen months after it arrived in Hoquiam. Now, it won't do to say eighteen months after the arrival of the steel; "I went in there and measured up certain steel that I found lying around the warehouse, and there is so much of it."

By the COURT.—It is a matter of explanation and argument whether it is all there or not. The Court allowed you to show by two witnesses, Mr. Neumeyer and Mr. Sulcove, that this contract had been performed. You are suing for the performance of the contract, and Mr. Sulcove admitted he was not around there and had not seen it since it was delivered, and Mr. Neumeyer stated it had [39] been delivered, and you, having been allowed to show that, I will permit this evidence to be introduced subject to any argument or whatever you can show that there may be less now or less when this examination was made, than when you delivered it.

(Testimony of George J. Flurshutz.)

Mr. ROBERTS.—Of course, counsel may have some other motive but if it is sought to be introduced here as a defense, or a partial defense, it would only be partial to such an extent as they could show it was not there, then I say that it is a defense that has to be pleaded; that it has not been pleaded, and a defense that has never been made.

Objection overruled. Exception allowed.

(Mr. BRUENER.)

Q. Answer the question.

A. The weights are if anything according to the scales I weighed them on, a little better than the invoice calls for in most instances.

Mr. ROBERTS.—A good deal of fuss for nothing.

A. Yes, sir.

Mr. BRUENER.—I was trying to show that the weights were all right, that is, with reference to the bārs actually found there.

WITNESS.—But in checking the invoice, there is a shortage of two— (Interrupted.)

Mr. ROBERTS.—Just a moment.

Q. I will show you this book, Mr. Flurshutz, and ask you to state whether or not as you took each bar and measured it and weighed it, you put down the bar—the number and size of it, and the kind of steel and the length [40] of it?

A. I did not put down the kind of steel, because I did not know there were different kinds of steel.

Q. Well, I mean the sizes.

A. The sizes, yes, sir. For instance, I checked off the bill, a bar of steel as I supposed, whatever it was,



(Testimony of George J. Flurshutz.)

either iron or steel, and put it from the pile on to the scales, and measured it as to the size, first, three by three, then took the length, eight feet three inches, then the weight, two hundred sixty pounds.

Q. You did that with every bar?

A. With every bar that came along.

Q. Of the entire amount of steel that was there present?     A. Yes, sir.

Q. I would like to have this book marked as identification "B." Now, I will ask you to state whether or not from that original book you made a segregation of the different sizes that you found there, and after making that segregation put the number of bars and the different sizes together.     A. Yes, sir.

Q. That would enable you to tell what?

A. That would enable me to tell what was there.

Q. That would enable you to tell the number of bars of any particular size of steel?     A. Yes, sir.

Q. Is that correct?     A. Yes, sir.

Q. And did you also put opposite the length of each bar, of each particular bar, of each particular kind? [41]     A. Yes, sir.

Q. I show you this paper and ask you whether or not it is the segregation made from this original book?

Mr. ROBERTS.—I object to that as incompetent, irrelevant and immaterial. If this is an effort to show that some of the lengths are not there, then I wish the objection to be made upon all of the grounds that I made to the other question, and especially upon the ground that it would not be fair, as I view

(Testimony of George J. Flurshutz.)

it, to allow him to go to a pile of rejected steel, that has been lying there eighteen months, and measure it eighteen months afterwards, and then bring in the evidence of what he found there eighteen months later; that this evidence must be confined to the time of the delivery.

By the COURT.—It is a matter going more to the weight of the evidence,—I understand you are not objecting to the evidence being offered in this form?

Mr. ROBERTS.—No, sir; I do not want to be technical about that at all.

Objection overruled.

Mr. BRUENER.—I would like to have this list marked as defendant's identification number "C."

Q. The lengths given in that segregation and book are correct?     A. Correct as I found them.

Q. And the number of bars and the sizes in that book and that list is correct as you found it?

A. Yes, sir.

Mr. BRUENER.—I will offer in evidence defendant's identification "B." [42]

Mr. ROBERTS.—The same objection, if the Court please.

By the COURT.—There is no objection as to the form?

Mr. ROBERTS.—No, sir; I do not object on the ground that it has not been properly presented, I mean as to what he put down here, or anything like that, but I object to it for any purpose in the case. Assuming that it has been properly made, I still object to it.

(Testimony of George J. Flurshutz.)

By the COURT.—The objection will be overruled. Gentlemen of the jury, you understand no added weight is to be given the witness' testimony merely because he wrote this down. It is simply admitted in this way, so it will be tabulated, so you can see what he is intending to testify to.

(Whereupon said document is admitted in evidence and marked Defendant's Exhibit "B" of this date.)

Mr. BRUENER.—I will now offer in evidence defendant's identification "C." It is a segregation of this original book. The other book would be unintelligible to the jury, that is his original record.

Mr. ROBERTS.—I do not raise any point about this paper not being the original, particularly after the explanation that the Court has just made, and I accept that tabulation, in so far as it is a tabulation, and I make no point of it not being an original.

By the COURT.—Do you still insist upon the retention of the book under that concession?

Mr. BRUENER.—I think not, your Honor.

By the COURT.—Very well, it may be withdrawn, and exhibit "C" will be admitted.

(Exhibit "B" withdrawn.) [43]

(Whereupon defendant's identification number "C" is admitted in evidence and marked Defendant's Exhibit "C" of this date.)

Mr. BRUENER.—As I understand it, Mr. Roberts, you do not dispute the correctness of this tabulation from the original book?

Mr. ROBERTS.—I do not admit the correctness of

(Testimony of George J. Flurshutz.)

this, but I will admit it is just as correct as the book is, and proves everything that the book could prove.

Q. Did you, after the first measurement, did you again count the number of bars, and measure the length of the different bars?     A. Yes, sir.

Q. How many days after the first measurement did you do that?

A. That was probably two or three days afterwards.

Q. With whom did you make that?

A. I believe the gentleman's name is Mills.

Q. And he is connected with what concern?

A. I understood he was connected with Hunt & Mottet Company.

Q. A hardware concern in Tacoma?

A. Yes, sir.

Q. What did you and he do with that steel?

A. This time we segregated it, put the different sizes of bars together, that is of the one-inch and all of the three-quarter inch all together in a pile, and then we measured them.

Q. How did you measure them?

A. A steel tape for the length and also a calliper for [44] size.

Q. What do you mean by calliper?

A. A calliper rule is a little sliding affair and you pull out this little slide and clamp it onto the bar of steel, and then you pull it off and it shows the size in inches.

Q. Is that what you use in your business for getting the size of such material as that?



(Testimony of George J. Flurshutz.)

A. Yes, sir.

Q. And as you measured each bar, did you make a notation at the time of the length and the size of each bar? A. Yes, sir.

Q. And what did you make that notation on?

A. In a large sort of a book that was furnished us.

Q. And you put the notations in in your own handwriting, did you? A. At the time, yes, sir.

Q. And as each bar was measured?

A. Yes, sir.

Q. I will show you this book (handing the book to witness), and ask you to state whether or not it contains the measurement of the different sizes of that steel. A. Yes, sir.

Q. Is that correct as you found it there?

A. Absolutely, yes, sir.

Q. How do the lengths for example compare with the measurements that you first made alone?

A. Very, very close.

Q. What would make the difference?

A. Well, for instance, in shearing off of this steel, it [45] is not cut exactly square, it is sheared off and sometimes—well it is pretty hard to tell it; it is not cut off straight, but it is cut kind of slanting, and the first time I measured it on the short side, and then measured it again, and the bar happened to be turned over on the other side, it varied from one-half to three-quarters of an inch, and that was about the variance between this tabulation and the other one.

(Testimony of George J. Flurshutz.)

Q. Now, the two you found to be substantially correct?

A. Oh, yes. I would say that it was correct.

Mr. BRUENER.—I will offer this book in evidence.

Mr. ROBERTS.—Is that not all carried on that paper? (Indicating paper.)

Mr. BRUENER.—This is not; this is the tabulation made from the original, and they went over it again, and this is the second tabulation.

WITNESS.—I made the first tabulation alone.

Mr. ROBERTS.—I understand that the two are substantially the same. A. Yes, sir.

Mr. ROBERTS.—I do not make any point except that I do not want to put all of these books in. If it is substantially the same, I do not see the necessity of putting it in.

By the COURT.—Are you going to introduce it so as to use Mr. Mills later?

Mr. BRUENER.—Yes.

By the COURT.—I do not understand that there is any objection that the Court can rule on.

Mr. ROBERTS.—Probably not, except that I was trying to [46] keep from encumbering the record, because I understood it was all on this paper (indicating); of course, I make the general objection that I have been making to all of this class of testimony, but I do not object to its form.

By the COURT.—The same ruling.

Exception allowed.

(Whereupon said book is admitted in evidence and marked Defendant's Exhibit "D" of this date.)

(Testimony of George J. Flurshutz.)

Q. Can you tell without referring to the book how many bars of one and one-quarter by four and one-half inch choker hook steel was in the shipment?

A. What size?

Q. One and one-quarter by four and one-half inch choker hook steel?      A. Two.

Q. Two bars of choker hook steel.

A. Yes, sir.

Q. That is, all of those bars that you found there was cut in two?

A. I could not say they were cut in two.

Q. A lot had been cut in two; that would account for the short lengths; that is, they were not twenty-feet long?      A. No, sir.

Mr. ROBERTS.—The order says, “were cut in two.”

Mr. BRUENER.—Well, one bar twenty foot long cut in two would make two bars.

Q. Your total weight from this tabulation for those two bars is four hundred and ninety-three pounds. [47]

A. Yes, sir.

Q. Did you find any bar or bars of steel there that did not appear on the order at all?

A. Well, in checking over the invoice, I did, yes, sir.

Mr. ROBERTS.—If the Court please I object to that. The question was whether or not he found any bars there that were not on the order.

Mr. BRUENER.—On the invoice?

A. Yes, I did.

(Testimony of George J. Flurshutz.)

Mr. ROBERTS.—Now, let us see.

Mr. BRUENER.—I will introduce the invoice and show it is exactly with the order.

Mr. ROBERTS.—Exactly with our order?

Mr. BRUENER.—No, sir, I will introduce the invoice we got from Neumeyer and Dimond showing exactly what they claim was shipped.

Mr. ROBERTS.—Is that what you claim that he had?

Mr. BRUENER.—Yes, sir.

Mr. ROBERTS.—Let the record show that this witness claims to have the invoice that came from Neumeyer & Dimond.

Mr. BRUENER.—I do not know as he had the invoice that came from Neumeyer & Dimond.

WITNESS.—I had a copy of the invoice.

Q. Just referring to this last page (indicating). Was there any bar of steel there that you did not—that did not appear on your invoice?

A. Yes, one bar of one and seven-eighths octagon tool steel shows in this pile of steel that it does not show on the invoice.

Mr. ROBERTS.—That is to say, you found a bar there that is [48] not on the invoice?

A. Yes, a bar of inch and seven-eighths octagon tool steel was in this pile of steel that does not appear on the Neumeyer and Dimond invoice.

Mr. ROBERTS.—In other words, that bar was there, but not on any written evidence that you had at all. A. Yes, sir.



(Testimony of George J. Flurshutz.)

(Mr. BRUENER.)

Q. Is that the invoice you had with you (indicating). A. Yes, sir.

Mr. BRUENER.—I would like to introduce the copy of this invoice in evidence.

Mr. ROBERTS.—I would like to have the original.

Mr. BRUENER.—This is the copy the witness used, and it is a correct copy of the original. The original will be introduced later.

Mr. ROBERTS.—You say it is a correct copy?

Mr. BRUENER.—Yes, sir.

Mr. ROBERTS.—All right. But the original will be introduced in evidence later?

Mr. BRUENER.—Yes, sir.

(Whereupon said paper was admitted in evidence and marked Defendant's Exhibit "E" of this date.)

Mr. BRUENER.—I would like to offer in evidence the original invoice sent by Neumeyer & Dimond to the Polson Logging Company, while we are on this subject.

Mr. ROBERTS.—All right.

By the COURT.—It may be admitted.

(Whereupon said invoice was admitted in evidence and marked Defendant's Exhibit "F" of this date.)

[49]

Q. Now, do you remember of any other shortage—  
(Interrupted.)

Mr. ROBERTS.—That was not a shortage; that was an over; that was more than was on the order.

Q. Did you find any other shortage other than the

(Testimony of George J. Flurshutz.)

choker hook steel? A. Well, there was one—

Mr. ROBERTS.—Counsel is in error unintentionally. The witness has not testified to any shortage.

By the COURT.—He testified to two bars, but whether or not it is a shortage is a matter of argument. You can call his attention to what he found of a certain class and then determine whether or not it was a shortage.

A. The invoice called for seven bars.

Mr. ANDERSON.—How many bars were there there?

A. Two.

Mr. BRUENER.—The invoice calls for seven bars and there are two bars there.

Q. What did you find with reference to any other size?

A. As I remember, it was the one-inch. There is one bar of one inch, but I do not remember whether it was the piston rod steel or— (Interrupted.)

Q. Does not your book show that?

A. Yes. There is so many kinds of steel there it is hard to remember them.

Q. Did you count the number of bars that you—after you had made this tabulation with Mr. Mills, do you know how many bars of steel all told were there?

A. Well, I could not say that I remember. I think the invoice as tabulated called for three hundred and [50] ninety-one bars, if I am not mistaken—let me see—I would rather not rely upon my memory. If I remember right, I found three hundred and

(Testimony of George J. Flurshutz.)

seventy-eight bars, and there is three hundred and ninety-one bars on the invoice.

Mr. ROBERTS.—Take the book and get that right.

A. (Examining book.) I was right; three hundred seventy-eight I found, and there are three hundred and ninety-one called for on the invoice.

Cross-examination.

(By Mr. ROBERTS.)

Q. What is the total weight?

A. I did not tabulate the total weight.

Q. Well, I do not know how we can get after this until we know about that. You have the weight here. (indicating paper)?

A. The weights are there, that is the total weight of the number of bars of the different kinds is here. Now, for instance— (Interrupted.)

Q. Well, as I understand it, your tabulation, you have carried out here in a column to the right, the weight of the various kinds. You simply have not computed the total?

A. Yes, I have not computed the total of the whole shipment.

Q. That is what I mean.

A. No, sir, I have not done that.

Q. How long will it take you to do that?

A. Not so very long. There is quite a few items there.

Q. Maybe that can be arranged after you leave the witness-stand. [51] Now, you say that where you weighed this, you found that it is a little better than

(Testimony of George J. Flurshutz.)

the requirements?      A. Yes, sir.

Q. So the weights were good honest weights?

A. Good honest weights, yes, sir.

Q. Now, at whose instance or request did you do this?      A. Why— (Interrupted.)

Q. The Polson Logging Company?

A. No, sir, Mr. Foster asked me to do it.

Q. Mr. Foster is your employer?      A. Yes, sir.

Q. You knew and you understood that you were doing it for the Polson Logging Company?

A. Yes, exactly, that is the way I understood it.

Q. That is what I mean. Now, what sort of a place was it where you found this steel?

A. Right in the general freight-shed, where all of the freight is handled.

Q. Do you call it a freight-shed? It is separate from the depot, is it?

A. I guess you would call it part of the depot. It is the freight depot. The freight part is over here (indicating) and the passenger part is over there (indicating).

Q. That is what I mean, the two are not together?

A. That is right.

Q. The freight department is open every day in the year?      A. Yes, except Sundays.

Q. Sometimes it is open on Sunday?

A. Not as I know of.

Q. Now, you say that there are out of three hundred and [52] ninety-one bars, eighteen short, that is, when you counted them right recently?

A. Here is what I say: I do not think about it at



(Testimony of George J. Flurshutz.)

all. I say what I know, that the bars I took were three hundred and seventy-eight bars, and in checking the invoice, I found that it called for three hundred and ninety-one bars.

Q. Thirteen less than the invoice you think it calls for? A. I do not think, I know.

Q. You could not be mistaken about the number of bars that the invoice calls for, do you think?

A. Well, I do not think I would be.

Q. Well, you said you know that you were not thinking, but that you know. I want to know whether or not you are still willing to state that you cannot be mistaken about the number of bars that the invoice calls for.

A. I do not say that: I said there were three hundred and seventy-eight bars that I counted; that is what I know, because I did that.

Q. But you would not say now that you might not be mistaken about three hundred and ninety-one being called for on the invoice?

A. My business there was to count the exact number of bars, and that is the number of bars I found. That was my business there.

Q. In counting the number of bars there, what you call a bar, and to let you know what I am trying to get at, I want to say that there may be confusion by reason of the fact that certain bars were cut.

A. I always consider a bar is a piece of steel. If there [53] was a piece of iron or steel on the floor there, six feet long, I call that a bar.

Q. So that you counted each piece, if there was two

(Testimony of George J. Flurshutz.)

feet, or five feet or sixteen feet, you would call that a bar?     A. I would call that a bar, yes, sir.

Q. Of course you have no knowledge of any kind as to what may have been put into that warehouse eighteen months ago?     A. No, sir, I have not.

Q. You say that the—that your attention was called to the matter for the first time only within two weeks?     A. Practically so, yes.

Q. Now, as I understand you, you think—I do not mean anything by that—I mean to say that you say—(Interrupted.)     A. I understand you.

Q. There were five less bars of choker hook steel than the invoice called for?

A. Well, that is according to the way that the invoice reads. Your invoice reads, “seven bars,” and later down below, it says that “twenty foot bars cut in two,” that would exactly mean that there were fourteen bars according to that invoice, whereas I only found two bars of that one particular size.

Mr. BRUENER.—Two bars cut in two.

A. No, sir, two bars. I explained to the gentleman that a piece of iron, whether it is five or seven or sixteen feet long, I call a bar.

(Mr. ROBERTS.) [54]

Q. Did you count fourteen or seven?

A. I did not count only two.

Q. I know, but you have given two figures, three hundred and ninety-one and three hundred and seventy-eight. In reading that number, three hundred and ninety-one, you counted fourteen bars of choker hook steel, did you not?     A. Exactly.

(Testimony of George J. Flurshutz.)

Q. Yes, so that you counted that choker hook steel as invoiced, was fourteen bars?

A. It is seven in this (indicating).

Q. I mean seven, yes; that is the way you interpreted that invoice? A. Yes, sir.

Q. And that went into this total of three hundred and ninety-one?

A. Yes, sir. That is as I remember, I took the total number of bars showing in your invoice, and doubled it.

Q. You doubled that in making your count of three hundred and ninety-one? A. Yes, sir.

Q. Well, now, if it should turn out that it was listed the other way, that would make a difference of seven bars right through, would it not?

A. What do you mean by listed the other way?

Q. Repeating question, I mean if it were listed in that invoice as seven and counted as seven, why it would make a difference of seven bars? I just wanted to see if I understood you about this doubling up. You counted seven bars more, as I understand [55] it, than it shows on the invoice. You say the invoice shows seven bars?

A. Seven bars, yes, sir.

Q. And you counted it fourteen?

A. I counted it two.

Q. No, sir, you counted it fourteen, when you figured it three hundred and ninety-one?

A. Yes, when I tabulated it.

Q. You counted it fourteen in order to get three hundred and ninety-one bars?

(Testimony of George J. Flurshutz.)

A. Yes, in checking the total of the original invoice.

Q. So you counted seven bars more than—seven bars more than we did?

A. Well, considering that your invoice calls for twenty foot bars cut in two,

Q. In other words you took this invoice, and you thought that Neumeyer and Dimond didn't know what they were doing, and that it ought to be doubled, and you proceeded to double it? That is what you did, didn't you? A. No, sir, I did not.

Q. Well, it is on here as seven and you counted it fourteen any way?

A. Yes, that is what I said I did. You say at the bottom of your invoice that those bars were twenty foot cut in two. That would make fourteen, would it not?

Q. No, sir. A. I think it would.

Q. Mathematically it would, but according to this invoice also it would. You are mistaken. I am not questioning your motives at all, but you are just honestly [56] mistaken. Now, aside from that, you found missing one bar of one-inch?

A. I did not say that I found that.

Q. Well, you did not find it?

A. Certainly not.

Q. It was not there?

A. Well, I would not say that that is the size. I know there is one other shortage, and it is my recollection it was the one-inch, but I would not swear.

Q. But you did find one that was not on there at



(Testimony of George J. Flurshutz.)

all? A. Yes, sir.

Q. Was that more or less than the one that was missing? A. What do you mean by more?

Q. Well, in quantity.

A. Well, I imagine it would be. It would weigh more.

Redirect Examination.

(By Mr. BRUENER.)

Q. I think counsel has made—unintentionally made you say something that you did not intend to say with reference to doubling up the whole order?

A. Well, I was going to speak about that. With reference to the last two bars, and also the two hundred and fifty feet, should not be doubled. The last two items were only eight feet each.

Witness excused. [57]

**[Testimony of Robert Gillispie, for Defendant.]**

ROBERT GILLISPIE, a witness produced on behalf of the defendant herein, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. BRUENER.)

Q. What is your name?

A. Robert Gillispie.

Q. You live in Seattle, Mr. Gillispie?

A. Yes, sir.

Q. How long have you lived there?

A. Seven years.

Q. What business are you in?

A. Logging supplies.

(Testimony of Robert Gillispie.)

Q. You are connected with the firm of the Mine and Mill Supply Company, are you not?

A. Yes, sir.

Q. I will ask you to state whether or not at my request you made a tabulation, taking Defendant's Exhibit "C" herewith shown you, as a basis, and figured out the shortage or overweight, as the case may be, of the different sizes of steel, and of the number as shown on that tabulation between the amount ordered, that is the length ordered, and the length actually shipped?

A. Yes, sir; I did.

Q. Just explain, taking for example, the first item on Defendant's Exhibit "C." I wish you would just explain the tabulation which you made.

Mr. ROBERTS.—As I understand it, Mr. Gillespie, you have not checked up this steel at all?

A. No, sir. [58]

Mr. ROBERTS.—Never have seen it?

A. Never have seen it; no, sir.

Mr. ROBERTS.—And you do not know anything about it, except some information given to you by someone else?

A. I only know what I saw in the invoice and the order.

Mr. ROBERTS.—I think I have been fairly liberal in allowing these figures and all that, but I think that this is going a little bit too far, to let Mr. Gillispie take this and say that it shows certain results. They are in evidence.

The COURT.—Complicated figures of this kind, I think it is competent for some witness to make cal-

(Testimony of Robert Gillispie.)

culations from them. If he is mistaken, I think it can be corrected. You have the exhibits here.

Mr. BRUENER.—Anybody can figure it out; it is a matter of figuring it out. It is simply a matter of arithmetic, and it is a convenient way of getting it before the Court and the jury.

The COURT.—As long as the tabulations have been partly made, it might be completed by adding that writing.

Mr. ROBERTS.—I object on the ground—this witness simply asked to take two certain papers here, about neither of which does he know anything, and then from those two papers to read a certain result. Now, I object to that because I cannot be allowed to do it, and furthermore because it would be a mere repetition of what the papers show. He has to take the two papers, because he cannot do it from one. Are you just asking him to state what the computations are on that one paper?

Mr. BRUENER.—No, sir; I can tell you in a very few words the figures I have made. [59]

Objection overruled.

Q. Take the first item, and explain that computation?

A. The first item calls for six  $11\frac{1}{2} \times 21\frac{1}{2}$ , 60 feet, 10-foot bars, or 20-foot bars cut in two, and I find according to this that they shipped 77 feet,  $21\frac{1}{4}$  inches, showing a weight of 983 pounds. Now I figure that that would be an overshipment of 17 feet,  $21\frac{1}{4}$  inches.

Mr. ROBERTS.—That is, you mean there was

(Testimony of Robert Gillispie.)

shipped 17 feet,  $2\frac{1}{4}$  inches more than the order called for?

A. Yes; and I figured to get at the weight of this over shipment if 77 feet,  $2\frac{1}{4}$  inches weighed 983 pounds, how much would 60 feet weigh, or what was ordered.

Q. Or, in other words, what would 17 feet,  $2\frac{1}{4}$  inches weigh?

A. Yes; and I took their own figures for it.

Mr. ROBERTS.—I cannot object to that, because he said we sent out more than we were going to charge you with, and I am satisfied with that.

Mr. BRUENER.—I do not know whether you are giving us that free or not. I think it is to the contrary.

Q. Did you make that computation with reference to each kind and description of steel that is shown on that exhibit? A. Yes, sir.

Q. And did you tabulate those figures that you made? A. Yes, sir.

Q. Are they correct, as far as you know?

A. As far as I know, they are correct. Those are my figures.

Mr. BRUENER.—I would like to offer in evidence this tabulation or summary as defendant's next exhibit.

Mr. ROBERTS.—My goodness, is that a new one?

Mr. BRUENER.—Yes. [60]

The COURT.—It may be admitted, with the same understanding, simply put in that shape for the jury to more readily understand, or grasp it, and to boil this thing down.



(Testimony of Robert Gillispie.)

Whereupon said document is admitted in evidence and marked Defendant's Exhibit "G" of this date.

Cross-examination.

(By Mr. ROBERTS.)

Q. Now, this matter of figuring out weights of steel is a complicated thing, is it not?

A. Not very, when you have the figures before you.

Q. When you have the figures before you?

A. Yes, sir.

Q. Well, I do not mean that; I mean when you come to figure it from the steel itself?

A. Not if you have a pair of scales to put it on.

Q. You are not pretending to do that. I understand you simply tabulated another fellow's tabulation, which had been tabulated from another tabulation; is that what you did? A. Yes, sir.

Q. I want to know what you know of this thing of getting at an actual shipment of steel. Let me put another question to you, Mr. Gillispie: It is not an unusual thing for an order to vary somewhat?

Mr. BRUENER.—I object to that as incompetent, irrelevant and immaterial, and not proper cross-examination.

Mr. ROBERTS.—They have shown that after all this tabulation and all this retabulation, that one bar was short, but that there was another bar in place of that, and that there were a couple of bars of choker steel out of a shipment of [61] thirty-eight hundred dollars' worth; I want to show that, even assuming that that is true, that that is not an unusual variance in an order of this magnitude.

(Testimony of Robert Gillispie.)

Objection overruled.

Mr. BRUENER.—We have not questioned the witness upon that point, if the court please. If they desire to make him their own witness—(Interrupted.)

Mr. ROBERTS.—If you make the point that it is not proper cross-examination. I think that the objection is good.

Witness excused. [62]

**[Testimony of George A. Mills, for Defendants.]**

GEORGE A. MILLS, a witness produced on behalf of the Defendants herein, being first duly sworn, testified as follows, to wit:

Direct Examination.

(Mr. BRUENER.)

Q. Your name is George A. Mills? A. Yes, sir.

Q. And you live in the City of Tacoma?

A. Yes, sir.

Q. And you are connected with what company?

A. I am in the employ of Hunt & Mottet.

Q. In what capacity?

A. Foreman of the warehouse for iron and steel.

Q. How long have you been engaged in that business? A. Something like sixteen years.

Q. Did you, at the request of the Folsom Logging Company, examine a shipment of steel in the freight warehouse in Hoquiam? A. Yes, sir.

Q. In the Northern Pacific freight warehouse at Hoquiam, and did you measure the different bars of steel that you found there? A. Yes, sir.

Q. With whom did you do that?

(Testimony of George A. Mills.)

A. With the gentleman—I do not remember his name, but he was on the stand here a few minutes ago.

Q. How did you do it?

A. Measured the length with a steel tape line, and the diameter with a calliper rule.

Q. What is a calliper rule?

A. Here is the one that I used there (indicating). You lay it [63] on the iron like this (illustrating), and that gives the diameter of the bar.

Q. Did you first select out of this shipment the different kinds before measuring?

A. Yes; laid them on the flat, each size by itself, and then measured them.

Q. Did you take each little pile and measure it?

A. Yes; and as fast as we measured each little pile, we moved it entirely out of the way with a chalk mark on them.

Q. You measured each bar and put down the length of each and every bar?

A. Each and every bar; yes, sir.

Q. And put them into a book?      A. Yes, sir.

Q. Are these the figures that you made (indicating), and did you make those figures at the time you measured each bar, and the length of each bar?

A. Yes; those are my figures. I made them on the 16th and 17th of this month.

Mr. BRUENER.—I will offer this in evidence.

Mr. ROBERTS.—Still another book?

Mr. BRUENER.—Still another book.

The COURT.—It may be admitted.

(Testimony of W. W. Brown.)

(Whereupon, Said Book is admitted in evidence, and marked Defendant's Exhibit "H" of this date.)

Witness excused. [64]

**[Testimony of W. W. Brown, for Defendant.]**

W. W. BROWN, a witness produced on behalf of the defendant herein, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BRUENER.)

Witness testified that he is the machinist, employed by the Polson Logging Co. at its main camp, called "Headquarters Camp," and had been so employed for a period of six years; that in September, 1912; Mr. Sulcove presented himself to the witness in the machine-shop; that Sulcove introduced himself to witness, handed witness a business card showing his name and business, and said that he had been sent up by the office, for the purpose of getting the sizes of the material the camp used there and other information; that Mr. Kline was the Superintendent and would be around shortly; that witness was busy and could not go with him at that time; that Sulcove requested permission to look around, and witness told him he could go wherever he pleased; that Sulcove was in different departments of the shop and was in and out of the machine shop, and when witness could see him, the latter was looking over the material, broken parts, etc.; occasionally he came to witness for information about material and the size thereof, and if it was large enough, etc.; that the agent had a scratch tablet and jotted down consider-



(Testimony of W. W. Brown.)

able information on this paper; that the agent was around about an hour and a half when Mr. Kline, the superintendent, came, which was about at 11:30 in the morning; that Kline and the agent talked for some time, but not in the presence of witness, but witness was called over a number of times to give information. Witness denied that he at any time told the agent that the camp needed material, and said there was nothing really necessary at that time; that he did not give the agent the number of bars [65] or any number of bars that appears upon the original order introduced by plaintiff, and did not give him the different descriptions or other specifications appearing on such order.

Witness then took a copy of the order and went over it, item by item, and explained that many sizes were not used by the company at all, and that for many items shown on the order, the company always used Norway Iron instead of steel, and in other respects the order was not such a one as could or would be used by the Polson Logging Co.

Cross-examination.

(By Mr. ROBERTS.)

On cross-examination witness testified that the Polson Logging Co. had only one main railroad, with different spurs running out from the main line, operated nine camps, and in general was a large concern; that when Mr. Sulcove came to camp he handed witness a card, but witness denied that it had the name of Mr. Kline or Mr. Brown thereon; admitted that Mr. Sulcove asked for information about sizes

(Testimony of W. W. Brown.)

and the kind of material used, and that the witness gave him such information; denied that he had told Sulcove that the camp needed anything at that time.

(Witness excused.)

**[Testimony of P. F. Kline, for Defendant.]**

P. F. KLINE, a witness produced on behalf of the defendant herein, being first duly sworn, testified as follows:

Witness was and is the superintendent of the defendant company, and he testified substantially as witness Brown, whose testimony is immediately hereinabove set out.

**[Testimony of J. C. Shaw, for Defendant.]**

J. C. SHAW, a witness produced on behalf of the defendant herein, having been heretofore sworn, testified as follows:

**Direct Examination.**

(By Mr. BRUENER.) [66]

Testified that he was the Chief Accountant of the defendant company, and connected with the defendant for a period of fourteen years. Testified that he does almost all of the buying of the merchandise for the cookhouses and the grocery department and the drygoods, and some small orders for iron; in the equipment line, in the rolling stock, the rails and roadbed, etc., and all heavy material, he usually does the buying at the instructions of Robert Polson. Testified that Mr. Sulcove had come to the office for two years previous and had never obtained an order for steel; that in September, 1912, when Sulcove

(Testimony of J. C. Shaw.)

came to the office, witness told him that the company was not open for any steel; that it had plenty in the warehouse; that Sulcove then wanted to go to camp, which permission was refused him by witness; that in order to go to camp he would have to get a pass from Robert Polson; that salesmen are not allowed at camp, and that to his knowledge he did not give Sulcove a card with the name of Mr. Kline and Mr. Brown written thereon; denies that he told Sulcove that he would call up Mr. Brown and Mr. Kline on the telephone and advise them of his coming; that Sulcove then went out and returned two days later, with the statement that he had been up to camp and that he had a few sizes of steel, and he showed witness a little slip of paper with a few sizes thereon, and he said that Mr. Kline was very desirous of trying some of the steel; that witness told him that if Kline wanted those few sizes, he would order them; that he signed an order for a few bars of steel at that time, and that the signature of "Polson Logging Company, per J. C. Shaw" on the original order introduced by plaintiffs, was his signature; that Sulcove did not give him a copy of the order and that the order introduced in evidence by the plaintiffs, was not the order [67] that he had signed, or, in other words, that this order contains more items than it did contain when he signed the order; that the order at the time he signed it, contained only specifications for four or five bars of steel; that he never heard of the order again until February of the next year, when the invoice came from Neumeyer & Dimond; that he gave the order

(Testimony of J. C. Shaw.)

for three or four bars, upon the agent's statement that Mr. Kline wanted the same.

Cross-examination.

(By Mr. ROBERTS.)

Witness admitted that he had bought small orders of iron and steel before and usually keeps a copy of all orders that go out; admitted that the signature on the order was his signature.

(Witness Excused.)

Plaintiff's Exhibit 10 was admitted in evidence without objection.

**[Testimony of Robert Polson, for Defendant.]**

ROBERT POLSON, a witness produced on behalf of the defendant herein, being first duly sworn, testified as follows:

That he lives in Hoquiam, and is the manager of the Polson Logging Company, and Mr. Alexander Polson is the President of the Polson Logging Co.; that the first time he heard of any order claimed to have been given to Neumeyer & Dimond, was in February, 1913, when he received an invoice in the mail for this steel. (Referring to Defendant's Exhibit "F.") He looked over the order and found it so strange that he looked through all the office records to find if there was any copy or any record of any such order, and he could find none, and he then asked Mr. Shaw about the order; and Mr. Shaw told him that he had given no such order; that witness has general charge of all the camps and is [68] a practical logger, having been in the business since 1894; that the company at no time ever purchased even a quarter of a carload of



(Testimony of Robert Polson.)

steel, but they purchase only a few bars at a time, and that there is a warehouse in back of the office at Hoquiam, in which they keep the tool steel, and this supply in the warehouse is always kept up by buying a few bars at a time; that he never met Mr. Sulcove except a year after the order was given, and that he had not given Mr. Sulcove a pass to go up to camp a year previous. He then went over the items on the order, specifically, and called attention to many items which were never used by the company and to many sizes which could not be used; also, that the quantities ordered there would last the company for a good many years to come.

(Witness excused.)

**[Testimony of Alexander Polson, for Defendant.]**

ALEXANDER POLSON, a witness on behalf of the defendant herein, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BRUENER.)

That he had lived in the State of Washington since 1879; that he is the President of the Polson Logging Co.; that the first he ever knew of an alleged order to Neumeyer & Dimond, was when his brother called his attention to an invoice in February, 1913; that his company had never purchased a carload of steel at any time. And his testimony in other respects, was substantially as Mr. Robert Polson's.

Redirect Examination.

He testified that his company first learned of any

(Testimony of Alexander Polson.)

discrepancy in the number of bars and of the kind and character and description of the steel sent, with that specified in the order, was shortly before the trial and after Mr. Mills and Mr. Flurschutz [69] had measured and weighed the same.

(Witness excused.)

Defendant's Exhibit "I" was then introduced without objection.

Defendant's Identification "A" was then introduced as Defendant's Exhibit "A-1"; also Defendant's Exhibit "J."

Defendant rests. [70]

### **Rebuttal.**

[**Testimony of George Christoph, for Plaintiff (in Rebuttal).**]

GEORGE CHRISTOPH, a witness produced on behalf of the plaintiff herein, being first duly sworn, testified in rebuttal as follows:

### **Direct Examination.**

(By Mr. ANDERSON.)

Q. What is your name?      A. George Christoph.

Q. What is your business?

A. Seattle Drayage & Storage, Seattle.

Q. Your Company handles shipments of freight?

A. Yes, sir.

Q. Have you ever transacted any business for Neumeyer & Dimond?      A. Yes, sir.

Q. Through your office in Seattle?      A. Yes, sir.

Q. In connection with the Polson Logging Company?

(Testimony of George Christoph.)

A. Yes, sir. Distribution of pool cars of steel and the like, manufactured or turned out by Neumeyer & Dimond.

Q. I show you Plaintiff's Exhibit No. 12, for identification, do you recognize that? A. I do, sir.

Q. Have you had them in your files?

A. Yes, sir.

Q. Since the date it bears? A. Yes, sir.

Q. What date is that? A. May 12, 1913. [71]

Q. What does it pertain to be?

A. It calls for twelve bars of  $1\frac{1}{4}$  by  $4\frac{1}{2}$  steel, shipped to the Polson Logging Company by the Northern Pacific May 12th.

Mr. ANDERSON.—We will offer that in evidence. No objection.

(Whereupon said document was admitted in evidence and marked Plaintiff's Exhibit No. 12 of this date.)

Q. I hand you Plaintiff's Exhibit No. 11; do you recognize that? A. Yes, sir.

Q. What does it cover?

A. Thirty-five bundles, one hundred and eighty-eight bars of steel and one hundred and ninety-one bars of steel, 28,265 pounds, under Neumeyer & Dimond order, 2012, shipped to the Polson Logging Company on March 8, 1913.

Q. That paper has been in your files since that date? A. It has.

Mr. ANDERSON.—I will offer that in evidence as Plaintiff's Exhibit No. 11.

No objection.

(Testimony of George Christoph.)

(Whereupon said document was admitted in evidence and marked Plaintiff's Exhibit No. 11 of this date.)

Q. On both of these papers it bears receipt?

A. My signature, Seattle Drayage & Storage Company, by myself.

Q. This one (indicating)?

A. This signature on both of those are receipted by the Northern Pacific. [72]

Cross-examination.

(By Mr. BRUENER.)

Q. This second shipment of twelve bars,  $1\frac{1}{4}$  by  $4\frac{1}{2}$  steel was shipped,—it bears date 5-12-13. That would be May 12, 1913? A. Yes, sir.

Q. And it was shipped approximately two months later than the first shipment of steel was sent, two months later than the other steel as shown by the other bill of lading, or whatever you call it?

A. Yes, sir.

(Witness excused.)

Mr. ROBERTS.—If the Court please, Mr. T. B. Sharp testified here yesterday as agent for the Railway Company at Hoquiam, and introduced the one bill of lading that the jury now has. I wired to him this morning, and have a telegram back, and counsel has consented that I may introduce it.

(Whereupon said telegram was admitted in evidence and marked Plaintiff's Exhibit No. 13 of this date.)

(Counsel for plaintiff reads Plaintiff's Exhibit No. 13 to the jury.)



(Testimony of George Christoph.)

Mr. BRUENER.—I consented that counsel might read this telegram. Now, it would appear that twelve bars of steel were shipped two months later, and when I put Mr. Sharp on the witness stand, I am satisfied that he did not know of it, and I am sure that I did not know of it, and I consent [73] that this telegram be put in so that it may be understood there was no intention on our part in any way to deceive any one in this matter, because we had no knowledge of this second shipment, and I am sure that Mr. Sharp did not.

Mr. ROBERTS.—That may be true, because Mr. Sharp wired back very promptly this morning when I wired him with respect to this second shipment.

**[Testimony of William E. Neumeyer, for Plaintiff,  
(in Rebuttal).]**

WILLIAM E. NEUMEYER testified in rebuttal for plaintiff, as follows:

Testified that he sells a great deal of tool steel to logging concerns and that the order taken from the Polson Logging Co. was a small order for a concern of that size. He denied Mr. Robt. Polson's testimony, to the effect that it would take years to use up such an order.

(Witness excused.)

**[Testimony of M. S. Sulcove, for Plaintiff (in  
Rebuttal).]**

M. S. SULCOVE, on rebuttal, testified substantially as Mr. Neumeyer.

(Witness excused.)

Plaintiff's Exhibit No. 14 was then offered in evidence without objection.

**[Testimony of Alexander Polson, for Plaintiff (in Rebuttal).]**

ALEXANDER POLSON, on sur-rebuttal, testified that he had absolutely no knowledge of the second shipment of steel testified to by Mr. George Christoph. [74]

Q. The first knowledge you had was here,— (interrupted.)

A. The first knowledge I had was here this morning.

Cross-examination.

(By Mr. ROBERTS.)

Q. You would not have taken it if you had known it was there?

A. If I had known it was shipped by Neumeyer & Dimond on this same order, I would not have taken it, no, sir.

(Witness excused.)

**[Motion for Directed Verdict, etc.]**

Mr. BRUENER.—If the Court please, I would like to interpose a motion at this time, and I would move the Court at this time to direct the jury to render a verdict in favor of the defendant upon these grounds:

That the evidence conclusively shows that the plaintiff has not complied with its contract, assuming all the other things about the contract, in shipping the goods shown on this order. I do not desire to

argue that at any great length at this time, but I desire to merely call the Court's attention to this fact: Leaving aside the question of the number of bars, because there probably will be some dispute about that, I will not discuss that or call your attention to it, but the Court will remember that Mr. Sulcove said he did not remember anything about the order; that he had nothing to do with it after it had been sent out. Mr. Neumeyer also testified that he knew nothing about the shipment after the order was sent in; that he just saw the shipment in the freight-shed in Hoquiam in a general way.

(Further argument by counsel for the defendant.)

[75]

The COURT.—Motion denied. Exception allowed.

Thereupon, after the close of the testimony and before the argument of counsel, defendant's counsel handed to the Court the following instructions requested by defendant to be given to the jury, to wit: Defendant's Requests Nos. 1, 2, 3, 4, 5 and 6.

(Jury addressed by counsel for the respective parties.)

### **Instructions.**

Gentlemen of the Jury:

The Court will instruct you regarding the law in this case. You will have the pleadings with you when you go out to the jury-room. These consist of the complaint and the answer and the reply. You will have those pleadings with you there, and if you have any doubt left in your minds after the Court has instructed you about what the allegations are

which are contained in these pleadings, you will at all times have the pleadings with you in the jury-room to resort to to determine just what the issues are. The Court will summarize the pleadings briefly, not thereby intending to excuse you from resorting to them, but in order that you may have more clearly in mind the dispute between the parties while the instructions are being given. The plaintiff is composed of a firm— (Interrupted.)

Mr. ROBERTS.—If the Court please, you will remember in the evidence that Mr. W. E. Neumeyer testified that now he is a member of the firm, and that he became such since the contract, and counsel has kindly consented that the complaint may be amended by stating the fact that at the time of the contract the firm was as alleged, excepting that it has now the addition of W. E. Neumeyer. [76]

The COURT.—Very well, that may be considered.

It is alleged that on the date mentioned in this complaint that the defendant corporation gave the plaintiff an order for certain merchandise, and that the plaintiff accepted the order and filled it according to its terms, and that the defendant has failed to abide by its terms and failed to pay the amount it agreed to pay when it gave the order.

The defendant comes into court in its answer and says that it did not give any such order. Then it goes on with an affirmative defense, setting up the claim, or a recital of how this agent presented himself to the office and made certain representations, of his going out to camp and making certain other representations, and then coming back to the office again



and presenting himself to Mr. Shaw, alleged to be the defendant's bookkeeper, and representing to Mr. Shaw that these men out there at the camp had represented to him that they needed certain steel, and that his Company manufactured the steel they sold, and that thereupon Mr. Shaw gave him an order for a very much less amount than appears on this contract—a copy of the contract is attached to the complaint which you will have with you, as well as the original—that these representations of this agent were fraudulent, and that because of them this contract that Mr. Shaw signed, that he was induced to sign it by reason of these false and fraudulent representations.

Now, in this case, before the plaintiffs can recover, they must show by a fair preponderance of the evidence that the contract they sue on was made with the [77] defendant; that they performed it and that the defendant has not performed it. If you conclude that the contract was entered into as written, and you come to consider the question of whether it was fraudulently obtained, before the defense can escape its payment then, it would be necessary for it, the Polson Logging Company, to show by a fair preponderance of the evidence that this fraud has been perpetrated as described by it in its answer.

Now, to consider these questions as I have outlined them to you, logically, the first thing to consider would be whether the defendant Company made this contract, executed this writing upon which the plaintiffs have brought their suit. The defendant is a corporation. It can only act through agents; it does

nothing by itself. If Mr. Shaw was the general buyer for the Polson Logging Company, but if there was some secret limitation or instruction upon the amount for which he would make a single purchase, or a single purchase of steel, without consultation with his superiors in the corporation, that would not bind the parties dealing with him, providing Mr. Shaw had been held out to the public as a general buyer, that is, it would not bind the persons dealing with him, unless they knew of the fact that there was this instruction or limitation upon his authority to buy. When you have determined that question in your minds, if you find that Mr. Shaw did not have any such authority, and that the plaintiffs knew it, or that it was so well known that they should, in the situation that their agent was placed there, have known that fact, why, you would not have to go any further. It would not be the defendant's contract unless Mr. Shaw [78] had the actual authority, or the apparent authority to make the contract; but if you determine that he either had the actual authority or that it was in the apparent scope of his authority, that he was held out in the eyes of the public to make a contract, and that he did make some contract, then you would go on to the next step, to see whether Mr. Shaw signed this contract that has been introduced in evidence, and a copy of which has been set up in the pleadings. If you find that he did not sign that contract as it appears, as it has been introduced and as it has been plead, but that he signed some other contract,—the Court is not exactly clear what Mr. Shaw's position there is; you are the sole and exclu-

sive judges of the testimony, and you will not be influenced by the Court's recollection of it, but whether Mr. Shaw meant to testify that this order, that something was added to it after he signed it, or that he was busy and this man came back and told him, "I have written down these three bars of steel we mentioned, you sign it," and he signed it under those circumstances, I do not remember. But if you conclude that the order was different than it has been introduced here, or plead, than when he did sign it, or if you should fail to find by a fair preponderance of the evidence that it was, at the time he signed it, as it has been introduced in evidence, and as it is plead, why that would be as far as you would go. This is the identical contract upon which this suit was brought, and this must be the one that was entered into before the plaintiff can prevail.

When you come to this matter of fraud, when you [79] come to consider that question, as I told you, the burden is upon the defendants to establish that defense. It is an affirmative defense and before the plaintiffs could be defeated from recovery upon that ground, the evidence must clearly and satisfactorily establish the fact that there was fraud; fraud is not presumed. Of course, the Court probably had better instruct you now what fraud consists of. The law has never undertaken to define what fraud is, that is, to make a comprehensive definition to include all fraud, because it has been found that the ingenuity of man is such that by the time the courts or legislatures would define fraud, that man would find some way or devise something else just as harmful that did



not come within that definition, but briefly, the fraud must contain the following elements, fraud of the kind of which complaint is made here: That is, a party in the situation that this agent Sulcove was whom it is claimed made these false representations, that he must represent something to be true; that that which he represents was not true, but that it was false; that when he stated it to be true, that he knew it was false; that he stated it with the idea of inducing the party to whom he stated it to act on the belief that it was true, and that it was such a statement as an ordinarily careful and prudent man, under the circumstances, would believe to be true, and that the man to whom he made it, Mr. Shaw in this case, actually did believe it, and acted on account of it in signing this contract, and that damage followed therefrom, or would follow if the contract was enforced. Now, you will notice in that instruction [80] that the false representation must have been made with the idea of its being acted upon, inducing Mr. Shaw to enter into the contract. Now, as something has been said about something that this agent said about his house manufacturing steel. If that was just a remark thrown in the course of a conversation with no intention of influencing Mr. Shaw in making this purchase, a matter where men might differ about what a house would have to do to manufacture, whether it actually had to have a factory,—it is a matter of common knowledge to you, these two partners would not have to make this steel with their own hands in order to come within the definition of having manufactured it. A general statement like that



would be susceptible of different meanings and you will, in the light of the circumstances, give it its ordinary meaning, and unless the agent intended to mislead and deceive and influence Mr. Shaw to make the purchase when he made that statement or such statements as you believe from the evidence that he did make, you will disregard it.

Now, a further instruction I will give you concerning fraud; a man who does not exercise ordinary prudence and caution himself in entering into a contract, cannot complain successfully. If Mr. Sulcove did nothing to deceive Mr. Shaw about what was in that order, and after a general talk, simply that he had been out there at the camp and looked around, a general talk upon which Mr. Shaw as an ordinarily careful and prudent man, situated as he was, would have no justification in relying upon as the basis of a contract, and the agent presented it to him, and he [81] simply signed it without looking at it, he cannot complain. But if the agent, after talking with Mr. Shaw regarding these few bars of steel, three, four or five, or whatever the small number was that Mr. Shaw testified about, he told him that it was all right, to write it up and then bring it in afterwards, and if he then brought it back and it contained all of these things, and he waited for Mr. Shaw and Mr. Shaw was busy and then gave it to Mr. Shaw and said, "I have written that up," and then Mr. Shaw had signed it, that would be fraud, and then the company would not be bound by a contract secured in such an unfair way, if you believe that the evidence clearly and satisfactorily shows that.

I have told you in the course of these instructions that fraud is not presumed. Now, the intention to deceive, as I have pointed out to you, is one of the elements of fraud, what a man's intentions are, whether or not he intends to deceive you, is a process of his mind; you cannot tell what a man intends, except by what he says and does, and the circumstances under which he says and does it.

A great deal of the evidence in this case has been admitted because there was a charge of fraud in the securing of this order. When an allegation of that kind is made, the rules of evidence are different; the bars are thrown down, and all the surrounding circumstances, and a great deal of evidence goes in, to enable you to make up your minds whether there was any intention to deceive. [82]

The burden of proof is upon the plaintiff as I pointed out to you, to show that the contract was made as they plead and that it was performed by them, that is, they must, before they can recover in this suit have furnished, as agreed by them, when they accepted this order, the kind, the amount, and the description of property included in the order for this merchandise. If they did not they cannot prevail.

The verdicts which I will submit to you, one finds for the defendant and one for the plaintiffs. The prayer of the Complaint, I believe, is for interest. If you find the performance of the contract by the plaintiffs, if you find they have under the instructions I have and will give you, you will insert in the blank that is left in one verdict, this amount, \$3,395.39, with

interest at six per cent from March 6th, 1913.

The Court will read to you certain written instructions. In so far as they may be repetitions of what I have already told you in substance you will not conclude that the Court is trying to impress upon your minds one part of the case to the exclusion of another part upon which there has been no repetition.

“This action is brought by Gustav Neumeyer and Abraham Diamond, copartners doing business under the name and style of Neumeyer & Diamond against the Polson Logging Company, a corporation, to recover \$3,895.39, together with interest at the legal rate, from March 6th, 1913, said sum being the alleged purchase price of certain goods wares and merchandise, which the plaintiffs [83] allege defendant ordered from them. The order which the plaintiffs allege was given by the defendant— (interrupted.)

Mr. BRUENER.—Excuse me, I think that was requested; I will withdraw that request and save time.

The COURT.—“The burden of proof is upon the plaintiffs to prove the material allegations of their Complaint by the preponderance of the evidence. The burden is upon them to prove the contract, the terms thereof, the performance of the contract on their part and also that the goods delivered or tendered to the defendant complied with the contract. It is also incumbent upon the plaintiffs to prove by a fair preponderance of the evidence that J. C. Shaw, who signed the order on behalf of the defendant, had authority or apparent authority, to sign this order on behalf of the defendant company, if you find that



he did so sign such order.

The burden of proof is upon the defendant to prove the material allegations of its affirmative defense by a fair preponderance of the evidence. In other words, if you find that J. C. Shaw, acting for the defendant company, gave the order of steel sued on, and said Shaw had authority, or apparent authority to bind the defendant company by such order of merchandise, then the burden rests upon the defendant to prove by a fair preponderance of the evidence that the signature of said Shaw to said order was procured through fraud of the salesman acting for and on behalf of the said plaintiffs."

"If you find that the defendant ordered the goods, [84] wares and merchandise sued on, and gave the order as contended for by the plaintiffs, and said order was not procured through fraud, as alleged by the defendant, and you find that the person who signed said order on behalf of the defendant company, to wit, J. C. Shaw, had authority, or apparent authority, as will hereafter be explained to order said goods on behalf of the defendant company, and if you further find that the plaintiffs delivered, or tendered the delivery of steel called for by the contract to the defendant at Hoquiam, Washington, and the defendant wrongfully refused payment thereof, then you will find for the plaintiffs for the amount agreed to be paid for said goods, as is provided for in such order, with interest. In determining the fact of whether or not the plaintiffs have complied with their contract, in delivering or in tendering delivery to the defendant of the steel ordered, if you find it was or-



dered, I instruct you that to constitute a good delivery in law, so as to make the defendant liable for said steel, the steel must correspond in quantity and in kind and description with that named in the order."

"It is incumbent upon the plaintiffs by a fair preponderance of the evidence to establish that the order for the merchandise in question was given by the defendant, and in order to establish that fact, it is further necessary for the plaintiffs to establish this fact, and it is further necessary for the plaintiff to establish by a fair preponderance of the evidence that J. C. Shaw had authority under the circumstances to act for the [85] defendant. If Mr. Shaw, with the knowledge of the Polson Logging Company, held himself out as the agent of such company, with authority to purchase supplies, the defendant company is bound by the contract which Mr. Shaw made with the plaintiffs for the steel, and this would be true, even if you should find that Mr. Shaw in making the contract, transgressed the instructions he had received from his principal. Any secret limitations upon his authority not revealed to the plaintiffs are no defenses to the defendant in this action. If you find that J. C. Shaw had authority to make purchases from persons with whom he chose to deal, or to make any indefinite number of purchases, he is deemed in law to be a general agent, and he is none the less a general agent because his powers do not extend over the whole business of his principal, the Polson Logging Company. It is immaterial whether or not Shaw exceeded his powers or authority, if you find that in making this purchase, if you find he did make

it, he was acting in the scope of his authority, that is, if you find the course of dealing of the defendant company, and the part taken therein by Shaw has been such as to reasonably warrant the presumption that Shaw was authorized to act in the capacity in which he was assumed to act in making this purchase, and if you find that the plaintiffs relied thereon in good faith, and the exercise of reasonable prudence, the defendant would then be bound by the acts of Shaw.”

“Fraud is never presumed. The presumption is that [86] all men deal fair and honestly with each other and the one who charges fraud assumes the burden of proving the fraud charged and before you would be justified in finding that any fraud was perpetrated by plaintiffs or their agent, you must find that defendant has proven such fraud by evidence that is clear and convincing to your minds as jurors.”

The Court in these instructions has referred to the burden of proof being upon the plaintiffs as regards making out a *prima facie* case, showing the contract and the performance by them and the non-performance by the defendant, and that the burden of proof, or the burden of showing fraud by a fair preponderance of the evidence was upon the defendant.

Now, this expression “fair preponderance of the evidence” as used in these instructions, means the greater weight of the evidence and as evidence does not weigh in the sense that material things do, the Court can only tell you that that evidence preponderates which is of such a character and so ap-

peals to your reason and your experience and your understanding as to create and induce belief in your minds if there is a dispute in the testimony, that it is still of such a character as to create and induce belief in your minds in spite of what has been brought against it.

You are, in this case, as in every case where questions of fact are submitted to the jury, the sole and exclusive judges of every question of fact in the case and the weight of the evidence and the credibility [87] of the witnesses. In weighing the evidence and in passing upon the credibility of the witnesses, you should take into account all that your experience has taught you regarding the guides which are safe, in arriving at where the truth lies in human transactions. Among the things you should take into consideration is the witnesses coming before you, how they testified, how they acted in giving their testimony, whether they struck you as trying to tell you the exact truth, neither adding to it or taking from it, telling you things just as they had seen or known them, or whether they appeared to you to be reluctant, evasive, hesitating, how they conducted themselves. On the other hand, you should take into consideration whether the witness appeared to be too willing, running on, constantly volunteering testimony about which nothing had been asked, what the law calls "Swift witnesses." Also you will take into consideration the situation in which each witness was as enabling that witness to clearly know and remember the things about which he undertook to testify, and the testi-



mony of each witness by itself, whether it is consistent as a whole, whether it is so detailed and exact and full as to induce belief in your minds, and whether it is corroborated where you would expect it to be corroborated if it were true, or whether it is contradicted by other evidence in the case. Also you should take into account the interest any witness may be shown to have in the case, and one of the plaintiffs having testified, and officers of the defendant company having testified, you will weigh their [88] evidence by the same rules that you weigh the evidence of other witnesses, including their natural interest in the result of the case.

If you should believe that any witness has testified falsely in any material matter at issue in this case, you may disregard the entire evidence of such witness, except as the same has been corroborated by other credible testimony. Before you apply this rule to the testimony of any witness, you must remember that it includes this element: It is necessary that he should have testified falsely, that means, that he testified falsely and with the obvious intention of deceiving you, not that he made a mistake, or testified in an exaggerated way, as interested witnesses are liable to do; it means that he willfully and intentionally testified falsely with the purpose of deceiving you, and not only that, but on a material matter. It is not everything that a witness says on the stand that is material in a lawsuit. It must be in some material matter; that means some element, or some part of the evidence that the case depends upon to some extent.



The COURT.—Anything further, gentlemen?

A JUROR.—I would like to ask about the weight. I am a little mixed on that, as to the shipment of the order.

The COURT.—You are the sole judges of the facts and the evidence, and a great part of it is written and part of it has gone in by word of mouth and you will have to settle that by yourselves.

Mr. ROBERTS.—I have no exceptions. [89]

Mr. BRUENER.—I desire to accept the *the* Court's refusal to grant the entire instruction Number 3 proposed by the defendant.

Exception allowed.

Mr. BRUENER.—I desire also to except to the refusal of the Court to give Instruction Number 4 requested by the defendant, also to the refusal of the Court to give requested instruction Number 6 by the defendant, and also I desire to except to the last written instruction given by the Court, which I think was propounded by the plaintiffs. The words "clear and convincing" I desire to except especially to.

The COURT.—If I used the word "convincing" I will change that to "clear and satisfactory," that is, on the instruction with regard to fraud, that is, it must be "clearly and satisfactorily shown." Otherwise, the exceptions will be allowed.

The COURT.—The case is over. I will say, Mr. Bruener, I think I went over in my general instructions what you are entitled to, in those two refusals. Both sides in this case have tried all of the fraud; it has been plead, and no objection made to the evidence, and it has been argued, but still, in my mind,

there is some question about whether some elements in fraud might lie in law, and be confined to equity, and I have tried to keep away from that point as far as I know while giving you everything I thought you were entitled to in your requests.

(Jury retires.) [90]

**[Instructions Requested by Defendant, and  
Refused.]**

INSTRUCTION No. 3, requested by defendant and which was refused by the Court and exception duly taken and allowed, reads as follows, to wit:

If you find that the defendant ordered the goods, wares and merchandise sued on and gave the order as contended for by the plaintiffs, and said order was not procured through fraud, as alleged by the defendant, and you find that the person who signed said order on behalf of the defendant company, to wit: J. C. Shaw, had authority or apparent authority, as will hereafter be explained, to order said goods on behalf of the defendant company, and if you find further that the plaintiffs delivered or tendered a delivery of the steel called for by the contract, to the defendant at Hoquiam, Washington, and the defendant wrongfully refused payment thereof, then you will find for the plaintiffs for the amount agreed to be paid for said goods, as provided for in said order, with interest. In determining the fact, whether or not the plaintiffs have complied with their contract in delivering or tendering delivery to the defendant of the steel ordered, if you find it was ordered, I instruct you that to constitute a good delivery in law, so as to make the defendant

liable for said steel, the same must correspond in quantity and in kind and description with that named in the order. The defendant was not obliged to accept any less or any greater number of bars of steel than ordered, nor was the defendant obliged to accept bars of steel *or* any less or *great* length than ordered, and if the steel, or any part thereof, delivered or tendered to the said defendant, did not comply with the contract in this, to wit: that said bars of steel were less or greater in number than shown on the order sued on, or said bars of steel, or some thereof, were not of the length specified in the order, but [91] were of a greater or less length, then the defendant had a right to reject the whole of said order so delivered or tendered, because the failure of the seller, the plaintiffs in this case, to deliver the quantity specified, or to deliver steel of the length specified, constituted a total breach of the contract. The plaintiffs in this case were bound to tender or deliver the number of bars of steel called for, and were bound to tender bars of steel of the length called for, and if you find that the plaintiffs did not deliver or tender delivery of the number of bars of steel specified in the order, or the bars delivered or tendered were of a greater or less length than twenty feet cut in two, then you will find your verdict for the defendant.

35 Cyc – Sales 202, 204, 206.

Am. & Eng. Encycl. Law, 2 Ed., Vol. 24, p. 1077.

Benjamin on Sales, 4th Ed., p. 800.

Brawley vs. U. S., 6 Otto 168, 06 U. S. 168, 171, 172.

Norrington vs. Wright, 29 Law Ed., p. 366, 115 U. S. 180.

Filley vs. Pope, 115 U. S. 213; 29 Law Ed. 372.

Pope v. Allis, 115 U. S. —, 29 Law Ed. 393.

Pittsburgh Plate Glass Co. vs. Kurlin Bros. Co., 122 Fed. 414.

Kalamazoo Corset Co. v. Simon, 129 Fed. 144.

J. A. Coates & Sons vs. Huffine, 41 N. E. p. 465.

Inman vs. Elk Cotton Mills, 92 S. W. 760.

Patrick vs. Norfolk Lumber Co. (Nebr.), 115 N. W. 780.

Springfield Shingle Co. v. Edgecomb Mill Co., 52 Wash. 620.

INSTRUCTION No. 4, requested by the defendant and refused by the Court and exception to the refusal being duly taken and allowed, reads as follows, to wit:

The defendant alleges in its affirmative defense, that the plaintiffs' salesman represented to Mr. Shaw, whose name is subscribed to the order, that the goods sold and to be delivered by his, the said plaintiff's firm, were manufactured by it, and that the said Shaw, acting on behalf of his company, was induced through said representation, to give the said plaintiffs an order for steel, differing, however, from the order sued on; that said representation so alleged to have been made, was [92] false, and that the goods sold and delivery tendered by the said plaintiffs were not, in fact, manufactured by them. In this connection, I instruct you, that if you find that the plaintiffs' agent did represent to Mr. Shaw, acting on behalf of the defendant company, *this* his said



firm would manufacture the steel and that the said Shaw was induced to sign an order for steel by reason of said representation, or said representation was one of the inducements to the said Shaw signing or giving said order, or any order; and if you find further, that said representation was false and that said plaintiffs did not manufacture said steel, then I instruct you that your verdict shall be for the defendant.

INSTRUCTION NO. 6 requested by defendant and refused by the Court and exception to such refusal having been duly taken and allowed, reads as follows, to wit:

If you find that the defendant ordered the goods, wares and merchandise sued on and gave the order as contended for by the plaintiffs, and said order was not procured through fraud, alleged by the defendant, and you find that the person who signed said order on behalf of the defendant company, to wit: J. C. Shaw, had authority or apparent authority, as will hereafter be explained, to order said goods on behalf of the defendant company, and if you find further that the plaintiff delivered or tendered a delivery of the steel called for by the contract, to the defendant at Hoquiam, Washington, and the defendant wrongfully refused payment thereof, then you will find for the plaintiffs for the amount agreed to be paid for said goods, as provided for in said order, with interest. In determining the fact, whether or not the plaintiffs have complied with their contract in delivering or tendering delivery to the defendant of the steel ordered, if you

find it was ordered, I instruct you that [93] to constitute a good delivery in law, so as to pass the title to the steel to the defendant and to make the defendant liable for steel, the same must strictly correspond in quantity and in kind and description with that named in the order. The defendant was not obliged to accept any less or any greater number of bars of steel than ordered, nor was the defendant obliged to accept bars of steel of any less or greater length than ordered, and if the steel delivered or tendered to the said defendant, did not comply with the contract in this: that said bars of steel were less or greater in number than shown on the order sued on, or said bars of steel were not of the length specified in the order, but were of a greater or less length, then the defendant had a right to reject the whole of said order so delivered or tendered, because the failure of the seller, the plaintiffs in this case, to deliver the quantity specified, or to deliver steel of the length specified, constituted a total breach of the contract. The plaintiffs in this case were bound to tender or deliver the exact quantity of bars of steel called for—neither more nor less—and were bound to tender bars of steel of the length called for—neither more nor less—and if you find that the plaintiffs did not deliver or tender delivery of the exact number of bars of steel specified in the order, or the bars delivered, or tendered were of a greater or less length than twenty feet cut in two, then you will find your verdict for the defendant. [94]

AND BE IT FURTHER REMEMBERED,  
That on the —— day of September, 1914, the jury

returned into court and rendered a verdict in favor of the plaintiffs and against the defendant, in the sum of \$3,895.39 and interest, and thereafter and, to wit: on the 30th day of September, 1914, defendant duly filed and served a Motion for Judgment Notwithstanding the Verdict;

AND BE IT FURTHER REMEMBERED, That thereafter, on the 9th day of October, 1914, Judgment was entered in said cause, in favor of the said plaintiffs and against said defendant, in the sum of \$3,895.39, together with interest and for costs and disbursements in said action;

AND BE IT FURTHER REMEMBERED, That thereafter and to wit: on the 14th day of November, 1914, the defendant duly filed and served a Motion for New Trial in said cause;

AND BE IT FURTHER REMEMBERED, That on the 24th day of November, 1914, and in term time, the Court did, on the application of the said defendant, and for good cause shown, give the said defendant until December 20th, 1914, in which to draw up, serve and file its Bill of Exceptions in said cause;

AND BE IT FURTHER REMEMBERED, That on the 30th day of November, 1914, defendant's Motion for Judgment Notwithstanding the Verdict and its Motion for a New Trial herein, were duly presented to the Court and argued, and said Motion for new trial was by the Court overruled; to which ruling the defendant excepted and its exception was duly allowed. [95]

Dated at Aberdeen, Washington, this 30th day of January, 1915.

BRIDGES & BRUENER,  
Attorneys for Defendant and Plaintiff in Error.

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**Grant of Writ.**

The Writ of Error prayed for in the above cause is hereby granted this 2 day of February, A. D. 1915, and the amount of bond to be given by the said petitioner, is hereby fixed at the sum of Ten Thousand (\$10,000) Dollars, which bond when accepted, conditioned as provided by the Circuit Court of Appeals, shall be a cost and supersedeas bond on appeal in said action.

EDWARD E. CUSHMAN,  
District Judge.

(Filed Feb. 2, 1915.) [98]

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**Assignments of Error.**

Comes now Polson Logging Company, the defendant, and makes and files the following Assignments of Error in the above cause, to wit:

I.

The District Court of the United States for the Western District of Washington, Southern Division, erred in overruling and refusing to grant defendant's motion for a nonsuit, at the close of the plaintiff's testimony, and in refusing to instruct the jury to bring in a verdict for the said defendant, after defendant had challenged the sufficiency of plaintiffs' testimony at the close thereof. Said motion should have been granted for the reason that the plaintiffs



failed to prove that they delivered or tendered delivery of the said defendant, bars of steel of the kind, character and description called for by the contract and in accordance therewith.

## II.

That the Court erred in overruling the defendant's motion for a directed verdict, at the close of all the testimony, for the reason that the evidence in the case conclusively shows that the plaintiffs did not deliver or tender delivery to the defendant, personal property of the kind, character and description called for by the contract sued on and in accordance with said contract.

## III.

That the Court erred in refusing to give to the jury Instruction No. 3, duly requested by said defendant on the trial of said cause, which instruction reads as follows: [99]

### INSTRUCTION NO. 3.

If you find that the defendant ordered the goods, wares and merchandise sued on and gave the order as contended for by the plaintiffs, and said order was not procured through fraud, as alleged by the defendant, and you find that the person who signed said order on behalf of the defendant company, to wit: J. C. Shaw, had authority or apparent authority, as will hereafter be explained, to order said goods, on behalf of the defendant company, and if you find further that the plaintiffs delivered or tendered a delivery of the steel, called for by the contract, to the defendant at Hoquiam, Washington, and the defendant wrongfully refused payment thereof, then you

will find for the plaintiffs for the amount agreed to be paid for said goods, as provided for in said order, with interest. In determining the fact, whether or not the plaintiffs have complied with their contract in delivering or tendering delivery to the defendant of the steel ordered, if you find it was ordered, I instruct you that to constitute a good delivery in law, so as to make the defendant liable for said steel, the same must correspond in quantity and in kind and description with that named in the order. The defendant was not obliged to accept any less or any greater number of bars of steel than ordered, nor was the defendant obliged to accept bars of steel of any less or greater length than ordered, and if the steel, or any part thereof, delivered or tendered to the said defendant, did not comply with the contract in this, to wit: that said bars of steel were less or greater in number than shown on the order sued on, or said bars of steel, or some thereof, were not of the length specified in the order, but were of a greater or less length, then the defendant had a right to reject the whole of said order so delivered or tendered, because the failure of the seller, the plaintiffs in this case, to deliver the quantity specified, or to deliver steel of the length specified, constituted a total breach of the contract. The plaintiffs in this case were bound to tender or deliver the number of bars of steel called for, and were bound to tender bars of steel of the length called for, and if you find that the plaintiffs did not deliver or tender delivery of the number of bars of steel specified in the order, or the bars delivered or tendered were of a greater or less length

than twenty feet cut in two, then you will find your verdict for the defendant.

35 Cyc-Sales, 202, 204, 206.

Am. & Eng. Encycl. Law, 2 Ed., Vol. 24, p. 1077.

Benjamin on Sales, 4th Ed., p. 800.

Brawley vs U. S., 6 Otto 168, 06 U. S. 168, 171,  
172.

Norrington vs. Wright, 29 Law Ed., p. 366, 115  
U. S. 180.

Filley vs. Pope, 115 U. S. 213, 29 Law Ed., 372.

Pope vs. Allis, 115 U. S. —, 29 Law Ed. 393.

Pittsburgh Plate Glass Co. vs. Kurlin Bros. Co..  
122 Fed. 414.

Kalamazoo Corset Co. v. Simon, 129 Fed. 144.

J. A. Coats & Sons vs. Huffine, 41 N. E., p. 465.

Inman vs. Elk Cotton Mills, 92 S. W. 760.

Patrick vs. Norfolk Lumber Co. (Nebr.), 115  
N. W. 780.

Springfield Shingle Co. vs. Edgecomb Mill Co.,  
52 Wash. 620." [100]

#### IV.

That the Court erred in refusing to give to the jury Instruction No. 4, duly requested by said defendant on the trial of said cause, which instruction reads as follows:

#### "INSTRUCTION NO. 4.

The defendant alleges in its affirmative defense, that the plaintiff's salesman represented to Mr. Shaw, whose name is subscribed to the order, that the goods sold and to be delivered by his, the said plaintiff's firm, were manufactured by it, and that the said Shaw, acting on behalf of his company, was

induced through said representation, to give the said plaintiffs an order for steel, differing, however, from the order sued on; that said representation so alleged to have been made, was false, and that the goods sold and delivery tendered by the said plaintiffs were not, in fact, manufactured by them. In this connection, I instruct you, that if you find that the plaintiffs' agent did represent to Mr. Shaw, acting on behalf of the defendant company, that his said firm would manufacture the steel and that the said Shaw was induced to sign an order for steel by reason of said representation, or said representation was one of the inducements to the said Shaw signing or giving said order, or any order; and if you find further, that said representation was false and that said plaintiffs did not manufacture said steel, then I instruct you that your verdict shall be for the defendant."

V.

That the Court erred in refusing to give to the jury Instruction No. 6, duly requested by said defendant on the trial of said cause, which instruction reads as follows:

"INSTRUCTION NO. 6.

If you find that the defendant ordered the goods, wares and merchandise sued on and gave the order as contended for by the plaintiffs, and said order was not procured through fraud, as alleged by the defendant, and you find that the person who signed said order on behalf of the defendant company, to wit: J. C. Shaw, had authority or apparent authority, as will hereafter be explained, to order said goods on behalf of the defendant company, and if you find fur-



ther that the plaintiff delivered or tendered a delivery of the steel called for by the contract, to the defendant at Hoquiam, Washington, and the defendant wrongfully refused payment thereof, then you will find for the plaintiffs for the amount agreed to be paid for said goods, as provided for in said order, with interest. In determining the fact, whether or not the plaintiffs have complied with their contract in delivering or tendering delivery to the defendant of the steel ordered, if you find it was ordered, I instruct [101] you that to constitute a good delivery in law, so as to pass the title to the steel to the defendant and make the defendant liable for said steel, the same must strictly correspond in quantity and in kind and description with that named in the order. The defendant was not obliged to accept any less or any greater number of bars of steel than ordered, nor was the defendant obliged to accept bars of steel of any less or greater length than ordered, and if the steel delivered or tendered to the said defendant, did not comply with the contract in this; that said bars of steel were less or greater in number than shown on the order sued on, or said bars of steel were not of the length specified in the order, but were of a greater or less length, then the defendant had a right to reject the whole of said order so delivered, or tendered, because the failure of the seller, the plaintiffs in this case, to deliver the quantity specified, or to deliver steel of the length specified, constituted a total breach of the contract. The plaintiffs in this case were bound to tender or deliver the exact quantity of bars of steel called for—neither more nor

less—and were bound to tender bars of steel of the length called for—neither more nor less—and if you find that the plaintiffs did not deliver or tender delivery of the exact number of bars of steel specified in the order, or the bars delivered or tendered were of a greater or less length than twenty feet cut in two, then you will find your verdict for the defendant.”

VI.

That the Court erred in denying defendant’s motion for judgment notwithstanding the verdict.

VII.

That the Court erred in denying defendant’s motion for a new trial, for the reason that Instructions No. 3, 4 and 6 should have been given by the Court to the jury, and because the testimony of the plaintiffs with reference to the completion of the contract on their part, was not sufficient to justify the verdict and the judgment.

WHEREFORE the defendant prays that the judgment of the said District Court of the United States for the Western District of Washington, Southern Division, be set aside and reversed.

BRIDGES & BRUENER,

Attorneys for Defendant.

(Filed Feb. 2, 1915.) [102]

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**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS: That we, Polson Logging Company, a corporation, as principal, and Alex Polson, Robert Polson, and W. J. Patterson, as sureties, are held and firmly

bound unto Gustave H. Neumeyer and Abrham J. Dimond, copartners doing business under the name and style of Neumeyer & Dimond, the plaintiffs above named, in the full and penal sum of Ten Thousand (\$10,000) Dollars, for which payment truly to be made, we and each of us, for ourselves, our successors, heirs, administrators and assigns, do bind ourselves jointly and severally, firmly by these presents.

Dated this 28th day of January, A. D. 1915.

The condition of this obligation is such,—

Whereas the above-named defendant, Polson Logging Company, has sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in the above-entitled cause by the District Court of the United States for the Western District of Washington, Southern Division,

Now, therefore, if the above-named defendant, Polson Logging Company, shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

It is expressly understood and agreed by the sureties hereto, that in case of breach of any condition of this bond, this Court may, upon notice to them of not less than ten (10) days, proceed summarily in this action to ascertain the amount which such sureties are bound to pay on account of such

breach, and render judgment therefore against them and let execution issue. [102½]

POLSON LOGGING COMPANY,

By ALEX POLSON,

President.

ALEX POLSON,

W. J. PATTERSON,

ROBERT POLSON,

Sureties.

State of Washington,

County of Chehalis,—ss.

Alex Polson, Robert Polson and W. J. Patterson, being first duly sworn, on oath, each for himself and not one for the other, deposes and says: That he is a resident and freeholder within the Western District of Washington, and that he is worth the sum mentioned in the foregoing obligation, over and above all his debts and liabilities, exclusive of property exempt from execution and in property situated in the State of Washington.

ALEX POLSON.

W. J. PATTERSON.

ROBERT POLSON.

Subscribed and sworn before me this 28th day of January, 1915.

[Notarial Seal]

THEO B. BRUENER,

Notary Public in and for the State of Washington,  
Residing at Aberdeen.

The foregoing bond approved as to form and sufficiency of sureties, February 2d, 1915.

EDWARD E. CUSHMAN,

Judge.



**Waiver of Sureties.**

The undersigned, Alex Polson, Robert Polson, and W. J. Patterson, being the sureties on the Appeal and Supersedeas Bond filed in the above cause, do hereby waive any objections to, or any claim of right or privilege by reason of the fact that the obligation of said bond runs only to two of the partners, to wit, Gustave H. Neumeyer and Abraham J. Dimond, in whose name the said suit was prosecuted, and does not run to the other partner, to wit, William E. Neumeyer, and who was made a party plaintiff at the end of the trial of said cause.

Dated at Aberdeen, Washington, this 18th day of February, 1915.

ALEX POLSON.

ROBERT POLSON.

W. J. PATTERSON.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 27, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [104]

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**Stipulation for Removal of Exhibits.**

IT IS STIPULATED by and between the parties hereto, through their respective attorneys, that all of the exhibits filed in the above-entitled court and in the above-entitled cause may be transmitted and sent to the Clerk of the Circuit Court of Appeals, in the appeal of the above-entitled cause as part of the record thereof.

Dated at Seattle, Washington, this 4 day of February, 1915.

JOHN W. ROBERTS,  
NELSON R. ANDERSON,  
Attorneys for Plaintiffs.  
BRIDGES & BRUENER,  
Attorneys for Defendant.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 10, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [105]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record, etc.]**

United States of America,  
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the above-entitled cause as the same remains of record and on file in my office, in said District, at Tacoma, and that the same is made pursuant to praecipe of counsel filed herein, and the same constitutes my return on the annexed Writ of Error.

I further certify and return that I hereto attach and herewith transmit the original Writ of Error, original Citation, original Order extending time for filing record on appeal, and original exhibits.

I further certify that the following is a full, true

and correct statement of all expenses, costs, fees, and charges incurred and paid in my office by and on behalf of the plaintiff in error herein, for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S.) for making record, certificate and return, 262 folios @ 15¢.....	\$39.30
Certificate of Clerk to transcript of record, 3 folios @ 15¢.....	.45
Seal to said Certificate.....	.20

Attest my hand and the seal of the United States District [106] Court for the Western District of Washington, at Tacoma, this 16th day of March, A. D. 1915.

[Seal]

FRANK L. CROSBY,  
Clerk.

By E. C. Ellington,  
Deputy. [107]

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*In the United States Circuit Court of Appeals, for the Ninth Circuit.*

POLSON LOGGING COMPANY, a Corporation,  
Plaintiff in Error,

vs.

GUSTAVE H. NEUMEYER and ABRHAM J. DIMOND, Copartners Doing Business Under the Name and Style of NEUMEYER & DIMOND,

Defendants in Error.

**Writ of Error.**

United States of America,—ss.

The President of the United States of America to  
the Honorable Judges of the District Court of  
the United States for the Western District of  
Washington, Southern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between Polson Logging Company, a corporation, plaintiff in error, and Gustave H. Neumeyer and Abraham J. Dimond, copartners doing business under the name and style of Neumeyer & Dimond, defendants in error, a manifest error hath happened to the damage of the said plaintiff in error, as by its answer appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, to command you, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this [108] writ, so that you have the same at San Francisco, California, in said Circuit, on thirty days from the date of this writ, in the said Circuit Court of Appeals, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to law and custom of the United States ought to be done.



Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 2d day of February, A. D. 1915.

[Seal]

FRANK L. CROSBY,

Clerk.

By E. C. Ellington,

Deputy Clerk of the Circuit Court of the United States for the Western District of Washington.

Allowed:

EDWARD E. CUSHMAN,

U. S. District Judge for the Western District of Washington, Southern Division. [109]

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. Polson Logging Company, a Corporation, Plaintiff in Error, vs. Gustave H. Neumeyer and Abrham J. Dimond, Copartners Doing Business Under the Name and Style of Neumeyer & Dimond, Defendants in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 2, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

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*In the United States Circuit Court of Appeals, for the Ninth Circuit.*

POLSON LOGGING COMPANY, a Corporation,  
Plaintiff in Error,

vs.

GUSTAVE H. NEUMEYER and ABRHAM J. DIMOND, Copartners Doing Business Under the Name and Style of NEUMEYER & DIMOND,

Defendants in Error.

**Citation.**

The United States of America,—ss.

The President of the United States of America, to  
Gustave H. Neumeyer and Abrham J. Dimond,  
Copartners Doing Business Under the Name and  
Style of Neumeyer & Dimond, Defendants in  
Error, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, at the Courtroom of said Court, in the City of San Francisco, and State of California, within thirty (30) days from the date of this citation, to wit, within thirty days from February 2d, 1915, pursuant to writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein Polson Logging Company, a corporation, is plaintiff in error, and Gustave H. Neumeyer and Abrham J. Dimond, copartners doing business under the name and style of Neumeyer & Dimond, are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned [110] should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 2d day of February, A. D. 1915.

[Seal] EDWARD E. CUSHMAN,  
Judge of the U. S. District Court for the Western  
District of Washington, Southern Division.

Service of the within Citation acknowledged this  
— day of February, A. D. 1915, by receipt of copy.

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Attorneys for Defendants in Error.

RETURN ON SERVICE OF WRIT.

United States of America,  
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Citation on the therein-named Gustave H. Neumeyer et al., defendants in error, by handing to and leaving a true and correct copy thereof with John W. Roberts, as attorney of record for defendants in error, personally, at Seattle, in said District, on the third day of February A. D. 1915.

JOHN M. BOYLE,

U. S. Marshal.

By Edward Williams,

Deputy.

Marshal's fees—\$2.12. [111]

[Endorsed]: In the United States Circuit Court of Appeals, for the Ninth Circuit. Polson Logging Company, a Corporation, Plaintiff in Error, vs. Gustave H. Neumeyer and Abraham J. Dimond, copartners doing business under the name and style of Neumeyer & Dimond, Defendants in Error. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 2, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

*In the United States Circuit Court of Appeals, for  
the Ninth Circuit.*

POLSON LOGGING COMPANY, a Corporation,  
Plaintiff in Error,

vs.

GUSTAVE H. NEUMEYER and ABRHAM J.  
DIMOND, Copartners Doing Business Under  
the Name and Style of NEUMEYER & DI-  
MOND,

Defendants in Error.

**Order Extending Time [to April 5, 1915, to File  
Return to Writ of Error].**

For good cause shown, IT IS NOW ORDERED  
that the time within which the return of the Clerk  
to the Writ of Error herein may be filed in San Fran-  
cisco, California, be and the same hereby is extended  
to and including April 5th, 1915.

Dated this 23d day of February, A. D. 1915.

EDWARD E. CUSHMAN,  
District Judge. [112]

[Endorsed]: No. ——. In the District Court of  
the United States for the Western District of Wash-  
ington, Tacoma. Polson Logging Company, Plain-  
tiff in Error, vs. Neumeyer & Dimond, Defendants in  
Error. Order Extending Time. Filed in the U. S.  
District Court, Western Dist. of Washington, South-  
ern Division. Feb. 23, 1915. Frank L. Crosby,  
Clerk. By F. M. Harshberger, Deputy.



[Endorsed]: No. 2584. United States Circuit Court of Appeals for the Ninth Circuit. Polson Logging Company, a Corporation, Plaintiff in Error, vs. Gustave H. Neumeyer and Abrham J. Dimond, Copartners Doing Business Under the Name and Style of Neumeyer & Dimond, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed March 19, 1915.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

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*In the United States Circuit Court of Appeals, for  
the Ninth Circuit.*

POLSON LOGGING COMPANY, a Corporation,  
Plaintiff in Error,  
vs.

NEUMEYER & DIMOND,  
Defendants in Error.

**Stipulation [That Certain Exhibits be not Printed].**

It is stipulated between the parties hereto that the Defendants in Error's Exhibit No. 9 and Plaintiff in Error's Exhibit No. A-1, be not printed by the clerk of this court.

BRIDGES & BRUENER,  
Attorneys for Plaintiff in Error.  
JOHN W. ROBERTS,  
NELSON R. ANDERSON,  
Attorneys for Defendants in Error.

[Endorsed]: No. 2584. United States Circuit Court of Appeals, for the Ninth Circuit. Polson Logging Company, a Corporation, Plaintiff in Error, vs. Neumeyer & Dimond, Defendants in Error. Stipulation. Filed April 2, 1915. F. D. Monckton, Clerk.

**[Certificate of Clerk U. S. District Court to Original Exhibits.]**

**OFFICE OF THE CLERK**

**UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF WASHINGTON,  
TACOMA.**

United States of America,  
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify the enclosed books, papers, documents, etc., marked Plaintiff's Exhibits 1 to 14, inclusive, to be the original exhibits introduced by plaintiffs, and filed in the said court and cause, and those marked Defendant's Exhibits "A," "A-1," "C," "D," "E," "F," "G," "H," "I" and "J," inclusive, to be the original exhibits introduced by defendant in said court and cause, wherein Gustave H. Neumeyer, Abraham J. Dimond and William E. Neumeyer, copartners as Neumeyer & Dimond, are plaintiffs, and Polson Logging Company, a corporation, is defendant.

Attest my official signature and the seal of this Court at Tacoma, this 16th day of March, A. D. 1915.

[Seal]

FRANK L. CROSBY,

Clerk.

By E. C. Ellington,  
Deputy Clerk.

[Endorsed:] 10 Filings Deft. Polson L. Co. 14 Filings Plff. Neumeyer et al. Reed. and Filed Meh. 18, 1915. Dv. 2.

No. 2584. United States Circuit Court of Appeals for the Ninth Circuit. Filed Mar. 19, 1915. F. D. Monckton, Clerk.

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**[Plaintiff's Exhibit No. 1—Order.]**

No. 2012.

Sept. 11th, 1912.

NEUMEYER & DIMOND, New York.

Enter our order for the following:

When Ship Soon as possible.

Ship to Polson Logging Company,

Hoquiam, Wash.

Send bill to Same.

3 bars  $1\frac{1}{2}$ "x $2\frac{1}{2}$ " Swivel steel.

2 bars each 2" Rd— $1\frac{3}{8}$ " Rd Clevis steel.

1 "  $2\frac{1}{4}$ " Round Swivel Eye steel.

7 "  $1\frac{1}{4}$ x $4\frac{1}{2}$ " Choker Hook "

2 bars each  $1\frac{1}{4}$ " Rd— $2\frac{1}{2}$ " Rd Block Hook Steel,

2 "  $2\frac{1}{4}$ " Round Line " "

2 "  $5/16$ "x14" Block Side steel.

2 "  $2\frac{3}{4}$ "  $\square$  Sledge steel.

2 " " 2" Rd— $2\frac{1}{2}$ " Rd— $1\frac{13}{16}$ " Rd Piston Rod steel.

1 "  $1\frac{1}{4}$ " Round Valve Rod steel.

1 "  $7/16$ "x $3\frac{1}{2}$ " Locomotive Spring steel.

25 " 1"x2" Dog Hook steel.

1 "  $5/8$ " Oct. 2 bars  $3/4$ " Oct Cold chisel.

2 " " 2"  $\square$   $1\frac{1}{2}$ "  $\square$   $1\frac{3}{8}$ "  $\square$   $1\frac{1}{4}$ "  $\square$  Track & Bull chisel.



- 1 “ 3" □ Splitting Wedge steel.  
 12 “ 1"x3" Falling & Bucking wedge.  
 12 “ “ 7/8 Rd—1" Rd—1 1/8" Rd—1 1/4" Rd Cold  
 sheet.  
 50 “ 3/4" Round cold sheet.  
 2 “ 1" “ Roller Bearing steel.  
 250 ft. 1 1/4"x6" Draw Head steel.  
 bars 20 ft long cut in two @12 1/2¢ lb.  
 8 ft each 3" □—4" □ Die steel (Ann.) 17¢ lb.

F. O. B. Hoquiam, Wash.

Polson Lg Co Order # 653.

as per copy left with us of this order.

Terms, 2% 10 days, 30 days net.

Signed POLSON LOGGING CO.

J. C. SHAW.

[Printed in margin:] This order is taken subject to delay in delivery caused by strikes, differences with workmen, serious fires, accidents to machinery, or other causes unavoidable or beyond our control.

[Endorsed]: Plts. Ident. No. I. No. 1507. United States District Court, Western District of Washington. Neumeyer & Dimond vs. Polson Logging Co. Plaintiff's Exhibit No. 1.

No. 2584. U. S. Circuit Court of Appeals for the Ninth Circuit. Plffs. Ex. No. 1. Recd. and Filed Mch, 18, 1915. F. D. Monckton, Clerk.

**Plaintiff's Exhibit No. 2—Day-Letter.]**

[Written on Blank of Western Union Telegraph  
Company.]

152CH ZU 29 BLUE BLUE

Hoquiam Wn Feb. 18th-13

Neumeyer and Diamond,

82-92 Beaver St., New York.

Just received invoice for steel Unable to use  
same Must be some mistake as no such order placed  
in our office Have you not sent invoice to wrong  
parties.

POLSON LOGGING CO.

330PM

Received

Feb 18 1913

Answered .....

[Endorsed]: Plts. Ident 2. No. 1507. United  
States District Court, Western District of Washing-  
ton. Neumeyer & Dimond vs. Polson Logging Co.  
Plaintiff's Exhibit No. 2.

No. 2584. U. S. Circuit Court of Appeals for the  
Ninth Circuit. Plaintiff's Exhibit 2. Received and  
filed Mch. 18, 1915. F. D. Monekton, Clerk.

**[Plaintiff's Exhibit No. 3—Night Letter.]**

[Written on Blank of Western Union Telegraph  
Company.]

699 CH 50 NL

Z

Hoquiam WN 24

Bumeyer and Dimond

82 92 Beaver St New York

The standing of our firm cuts no figure in this transaction We have no record of ever buying a dollars worth of goods from your firm and no record of placing any order with your firm Mr Shaw positively denies giving your firm any such order Will not accept shipment

POLSON LOGGING CO

1258 AM

Feb 25

Received

59

Feb 25 1913

Answered . . . . .

[Endorsed]: Plts. Ident. 3. No. 1507. United States District Court, Western District of Washington. Neumeyer & Dimond vs. Polson Logging Co. Plaintiff's Exhibit No. 3.

No. 2584. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 3. Received and filed Mch. 18, 1915. F. D. Monckton, Clerk.

**[Plaintiff's Exhibit No. 4—Letter.]**

[Letter-head of Polson Logging Company.]

Hoquiam, Wash., March 22-1913.

Neumeyer & Dimond,

82 Beaver St.,

New York City.

Gentlemen:

Your favor of the 17th inst., to hand. As stated in our former letters and telegrams to you there is absolutely no record that we can find in our office of an order our firm has given to your firm, and our Mr. Shaw denies any knowledge of giving your solicitor any order whatever. We will not accept shipment.

Yours very truly,

POLSON LOGGING CO.

ALEX POLSON, Pres.

Received

Mar. 29, 1913

Answered 3/31

to Mr. Shaw

[Endorsed]: Plts. Iden. 4. No. 1507. United States District Court, Western District of Washington. Neumeyer & Dimond vs. Polson Logging Co. Plaintiff's Exhibit No. 4.

No. 2584. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 4. Received and filed Mch. 18, 1915. F. D. Monckton, Clerk.



**[Plaintiff's Exhibit No. 5—Letter.]**

[Letter-head of Polson Logging Company.]

Hoquiam, Wash., May 22, 1913.

Messrs. Neumeyer & Dimond,

New York, N. Y.

Gentlemen:

Your letter of May 17th, with enclosed copy of letter from the Northern Pacific Ry. Co., to hand. You have our previous letters containing a denial that we ever placed an order with your company for any steel of any kind or description, and will not be responsible for the steel in any shape, manner or form.

Yours very truly,

POLSON LOGGING COMPANY,

By ALEX POLSON,

AP-A.

President.

Received

May 29 1913

Answered 6/2

[Endorsed]: Plts. Ident. 5. No. 1507. United States District Court, Western District of Washington. Neumeyer & Dimond vs. Polson Logging Co. Plaintiff's Exhibit No. 5.

No. 2584. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 5. Received and filed Mch. 18, 1915. F. D. Monckton, Clerk.

**[Plaintiff's Exhibit No. 6—Letter.]**

[Letter-head of Neumeyer & Dimond.]

New York, U. S. A., March 1st, 1913.

Polson Logging Company,  
Hoquiam, Wash.

Gentlemen:—

Wish to refer you to several telegrams that have been interchanged in reference to Order #2012, your number 653.

We have taken this matter up with our representative, who has sold you this material and received reply from him to-day, in which he advised that he has sold this bill to Mr. Shaw and on account of the numerous items that order contained he has pasted copy of order left with him in your order book and has given our representative your order #653.

The date on which order has been taken was September 26th, and was signed by Polson Logging Co.,

Per J. C. Shaw

and as you state in your telegram that Mr. J. C. Shaw positively denies placing this order we will ask him to refresh his memory and the fact that he have signed order on hand with his signature which we are sure he cannot deny.

Steel has been shipped February 6th and advise that you accept same as we have carried out contract made between Mr. Shaw and our representative.

Respectfully yours,  
NEUMEYER & DIMOND,

AJD/GS

A. J. DIMON

[Endorsed]: Plts. Ident. 6. No. 1507. United States District Court, Western District of Washington. Neumeyer & Dimond vs. Polson Logging Co. Plaintiff's Exhibit No. 6.

No. 2584. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 6. Received and filed Mch. 18, 1915. F. D. Monckton, Clerk.

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**[Plaintiff's Exhibit No. 7—Telegram.]**

[Written on Blank of Western Union Telegraph Company.]

R77CH V& 23

Hoquiam Wn Feb 19 1913

Neumeyer and Diamond

82, 92 Beaver St New York

No record of order in office You must prove that order is not a forgery or obtained by fraud we will not accept

POLSON LOGGING CO.

818PM

Feb. 17 1913

Received

Feb. 20 1913

Answered 3/29

[Endorsed]: Plts. Ident. 7. No. 1507. United States District Court, Western District of Washington. Neumeyer & Dimond vs. Polson Logging Co. Plaintiff's Exhibit No. 7.

No. 2548. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 7. Received and filed Mch. 18, 1915. F. D. Monckton, Clerk.

**[Plaintiff's Exhibit No. 8—Telegram.]**

[Written on Blank of Western Union Telegraph  
Company.]

Received at 6 EA B 14

FX—New York NY Feb 19-13.

Polson Logging Co,  
Hoquiam, Wn.

Order placed September eleventh Signed by company Per J. C. Shaw. Must accept shipment.

NEUMEYER AND DIAMOND.

1155 AM

When answering this message, phone "Western Union" (No phone number necessary) "Central" will do the rest.

[Endorsed] Plts. Ident. 8. No. 1507. United States District Court, Western District of Washington. Neumeyer & Dimond vs. Polson Logging Co. Plaintiff's Exhibit No. 8.

No. 2584. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 8. Received and filed Mch. 18, 1915. F. D. Monckton, Clerk.



**[Plaintiff's Exhibit No. 10—Day-Letter.]**

[Written on Blank of Western Union Telegraph  
Company.]

February 21st, 1913.

To Polson Logging Co.,

Hoquiam, Washington.

Using the term fraud is very unbusinesslike for a firm of your standing we cannot be responsible if there is any mistake in your office records if you had asked Mr. Shaw about this order it would have saved any fraud accusations on your part you must accept shipment.

NEUMEYER & DIMOND

[Endorsed]: Plts. Ident. 10. No. 1507. United States District Court, Western District of Washington. Neumeyer & Dimond vs. Polson Logging Co. Plaintiff's Exhibit No. 10.

No. 2584. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 10. Received and Filed Mch. 18, 1915. F. D. Monckton, Clerk.



For use in connection with the Standard form of Bill of Lading approved by the Interstate Commerce Commission by Order No. 357 of June 27, 1906.

**THIS MEMORANDUM**

is an acknowledgment that a Bill of Lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

Railroad Company

Shippers No. *G*

Agents No.

RECEIVED, subject to the classification and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

*8/8/13* 19 *13* from **NEUMEYER & DIMOND, 82-92 Beaver St., New York,**

The property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), packed, examined and counted on by the carrier, which said Carrier agrees to carry to its usual place of delivery at said destination, or on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from *to* is in Cents per 100 Lbs.

IF Through	IF 1st Class	IF 2d Class	IF Rule 25	IF 3d Class	IF Rule 26	IF Rule 28	IF 4th Class	IF 5th Class	IF 6th Class	IF Special per	IF Special per

Consigned to

*Polson Logging Co*  
*Hoguenan*

Mail Address—Not for purposes of Delivery.

Destination

State of *Wash*

County of

Route

Car Initial

Car No.

NO. PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT Subject to Correction	CLASS OR RATE	CHECK COLUMN	If charges are to be prepaid, write or stamp here. "To be prepaid."
<i>35</i>	<i>Bals 188 Bals Steel</i>	<i>28265</i>			
<i>14</i>	<i>Bals Steel</i>				
	<i>#2012</i>				

Received \$  
to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

**FOR PAC. RT.**  
**J. W. ALLEN**

Signature here acknowledged on bill (if prepaid.)

Check column

NEUMEYER & DIMOND, Shippers. Per *SSC*

Agent. Per

447, APRIL 24, 1906. WFO. BY AMERICAN SALES COOR CO., CHICAGO, ILL.

225



# CONDITIONS

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless stated on or made the contrary, all claims shall be barred.

Any carrier or party in possession of any of the property herein described shall have the benefit of any insurance that may have been obtained upon or on account of such property, or the same shall not cover the previous or continuing loss or damage.

Sec. 4. All property shall be subject to customary charges and duties at origin's point. Freight charges shall be paid in advance to be paid at destination when the property is delivered. The carrier and risk, of transportation are upon the shipper or owner, in forwarding or forwarding, and shall be held responsible for accidents or unavoidable delays

in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

Sec. 6. No carrier will carry or be liable in any way for documents, specie, or for any articles of extraordinary value not specially rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping flammable or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense and destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight thereon must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waterway or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. Any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and to use vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lightering across rivers or in lake or other harbors, and the liability for such lightering shall be governed by the other sections of this instrument.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

Case No. 1507

UNITED STATES DISTRICT COURT

Western District of Washington

Newmyer & Dinwood

Polson Logging Co.

Plaintiff's Exhibit No. 11

Plaintiff's Exhibit 11

Received & Filed Feb 18 1915  
F. D. MONTGOMERY, Clerk



Pls Ident 12

with The Standard Form of Highlights

Slippers No. 2/6/13

Agents No.

5712

1913 from NEUMEYER & DIMOND, 82-92 Beaver St., New York.

the property described below, in apparent good order, except as noted, contents and condition of packages unknown, packed, contained and destined as indicated below, which said Company agrees to carry to the usual place of delivery at said destination, if on its land, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route of destination, and as to each party at any time interested in all or any of said property, that every privilege to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from ..... to ..... is in Cents per 100 Lbs.

[illegible]

Mail Address—Not for purposes of Delivery.

Consigned to

### Destination

## Route.

State of Oklahoma County of Adair

Car Initial.....Car No.

NO PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT Subject to Correction	CLASS OR RATE	CHECK COLUMN	If charges are to be prepaid, write or stamp here. "To be prepaid."
12	Bushings 2 1/2" Steel	264.5 lb			Received \$ to apply in prepayment of the charges on the property described herein
					Agent or Cashier.
					Per (The signature here acknowledges only the amount prepaid.)
					Charges advanced

NEUMEYER & DIMOND, Shippers.

Per *Handwritten signature*

Agent. Per

SOLE BY AMERICAN SALES BOOK CO., ELMHURST, N. Y.

...

727

# CONDITIONS

**Sec. 1.** The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

**Sec. 2.** In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law, only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

**Sec. 3.** No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

**Sec. 4.** All property shall be subject to necessary consignment and baling at owner's cost. Each carrier over whose route section 3 is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delay

in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

**Sec. 5.** Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing of which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

**Sec. 6.** No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

**Sec. 7.** Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

**Sec. 8.** The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon receipt it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

**Sec. 9.** Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and conditions provided by statute and to the conditions contained in this bill of lading and in connection with such statute or this section, and subject to the condition that no carrier or party in possession shall be liable for loss or damage resulting from the perils of the lakes, sea, or other waters, or from explosion, bursting of boilers, breakage of staves, or any kind of defect in hull, machinery, or appliances, or from collision, stranding, or other accidents of navigation, or from perils of the voyage, and any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports to tow and to be towed, and to be towed in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including transshipment across rivers or in lake or other harbors, and the liability for such transshipment shall be governed by the other sections of this instrument.

**Sec. 10.** Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof herein signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

For the Ninth Circuit

U. S. Circuit Court of Appeals

Case No. 1507

UNITED STATES DISTRICT COURT

Western District of Washington

Newmyer & Dinwood

Colon Logging Co.

Plaintiff's Exhibit No. 12

F. D. MINNICK, Clerk

**[Plaintiff's Exhibit No. 13—Telegram.]**

[Written on Blank of Western Union Telegraph  
Company.]

27PO HN 13 COLLECT KL

Plff's Ident. 13.

Hoquiam Wn Sept 26 1914

John Roberts

Federal Court Tacoma

Steel arrived and delivered to Hoquiam Livery  
and Transfer Company May fourteenth

T D SHARP

1102A

[Endorsed]: No. 1507. United States District  
Court, Western District of Washington. Neumeyer  
& Dimond vs. Polson Logging Co. Plaintiff's Ex-  
hibit No. 13.

No. 2584. U. S. Circuit Court of Appeals for the  
Ninth Circuit. Plaintiff's Exhibit 13. Received  
and Filed Mch. 18, 1915. F. D. Monckton, Clerk.



**[Plaintiff's Exhibit No. 14—Letter.]**

June 13th, 1913.

Polson Logging Company,  
Hoquiam, Wash.

Gentlemen:—

Replying to yours of the 6th inst., in which you advise that there are many size of steel that have never been used, in this you are evidently in error as we have been selling steel to the logging camps for many years and the several sizes that have been ordered by you have been used heretofore by the other camps, however, that is immaterial since the sizes have been given by Mr. Shaw and he should know your requirements.

Advise that you accept this shipment from the Railroad Company thereby saving unnecessary storage charges, for which you are responsible, and if there are any sizes that Mr. Shaw has ordered by mistake we are perfectly willing to exchange them for those you will be able to use; our representative will call upon you within the next sixty (60) days and advise that you accept this shipment and matters can be adjusted with him.

Respectfully yours,

NEUMEYER & DIMOND.

AJD/GS

[Endorsed]: No. 1507. United States District Court, Western District of Washington. Neumeyer & Dimond vs. Polson Logging Co. Plaintiff's Exhibit No. 14.

No. 2584. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 14. Received and Filed Mch. 18, 1915. F. D. Monckton, Clerk.



## [Defendant's Exhibit "A"—Freight Bill.]

## FREIGHT BILL.

Consignee	Station	Date	Freight Bill No
Polson Logging Co	Hoquiam	3/11/13	433

Destination and Route, if for Beyond Issuing Station

To NORTHERN PACIFIC RAILWAY COMPANY, Dr., for charges on articles transported.

Billing Station and Route	Way-Bill No.	Date	Car Initial and Number
Seattle	4134	3/8/13	EJE 60036

Shipper and Original Point of Shipment	Connecting Line Reference	Original Car
Neumayer & Diamond		

Number of Packages, Articles and Marks	Weight	Rate	Freight	Advances
35 Bdl 188 Bar Steel				

191 Bar Steel	28265	12	33 90
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Refused a/c not ordered.

OK 12/9

Total to Collect 33 90

Received payment .....191..

..... Agent.

Per ..... Cashier.

F C A 52817

All carloads shall be subject to a storage or demurrage charge if not removed within 48 hours.

[Endorsed]: No. 1507. United States District Court, Western District of Washington. Neumeyer & Dimond vs. Polson Logging Co. Defendants' Exhibit A.

No. 2584. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit A. Received and filed Mch. 18, 1915. F. D. Monckton, Clerk.

## [Defendants' Exhibit "C"—Statement.]

3 Bars.  $1\frac{1}{2} + 2\frac{1}{2}$  Swivel Steel Weight.

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972 Lbs.

1 Bar	“	L. 13' $\frac{3}{4}$ "	W. 168#
1 “	“	“ 13' $1\frac{3}{4}$ "	“ 170#
1 “	“	“ 13' $\frac{3}{4}$ "	“ 170#
1 “	“	“ 13' $1\frac{1}{2}$ "	“ 167#
1 “	“	“ 12' $7\frac{1}{2}$ "	“ 161#
1 “	“	“ 12' 3"	“ 147#

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6 Bars		L. 77' $2\frac{1}{4}$ "	983#
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2 Bars. 2" Round Clevis Steel Weight.

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516#

1 Bar	“	L. 12' $2\frac{1}{2}$ "	W. 131#
1 “	“	“ 12' 3"	“ 131#
1 “	“	“ 12' $2\frac{1}{2}$ "	“ 132#
1 “	“	“ 11' $8\frac{1}{2}$ "	“ 127#

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4 Bars		L. 48' $4\frac{1}{2}$ "	“ 521#
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2 Bars.  $1\frac{3}{8}$  Round Clevis Steel Weight

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290#

1 Bar	“	L. 14' 4"	“ 75#
1 “	“	“ 14' 2"	“ 74#
1 “	“	“ 14' 5"	“ 75#
1 “	“	“ 14' $1\frac{1}{2}$ "	“ 72#

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4 Bars	“	L. 57' $1\frac{1}{2}$ "	W. 296#
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1 Bar  $2\frac{1}{4}$ " Round Swivel Eye Steel. Weight.

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328#

1 " " L. 12' 3" W. 166#

1 " " " 12'  $2\frac{1}{2}$ " " 166#

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2 " " " 24'  $5\frac{1}{2}$  " 332#

7 Bars  $1\frac{1}{4}\times 4\frac{1}{2}$  Chocker Hook teel. Weight

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3135#

1 Bar " " 12'  $10\frac{3}{4}$ " " 252#

1 " " " 12' 7" " 241#

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2 Bars " " 25'  $5\frac{3}{4}$ " " 493#

2 Bars  $1\frac{1}{4}$ " Round Block Hook Steel Weight.

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233#

1 Bar " " 12'  $8\frac{1}{2}$ " " 53#

1 " " " 14' 6" " 66#

1 " " " 13' 7" " 57#

1 " " " 13' 2" " 55#

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4 Bars " L. 53'  $11\frac{1}{2}$ " W. 231#

2 Bars  $2\frac{1}{2}$ " Round Block Hook Steel. Weight.

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798#

1 Bar " L. 11' 4" W. 191#

1 " " " 11'  $4\frac{1}{2}$  " 192#

1 " " " 11' 9" " 200#

1 " " " 12'  $8\frac{3}{4}$ " " 215#

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4 Bars " L. 47'  $2\frac{1}{4}$ " W. 798#

2 Bars  $2\frac{1}{4}$ " Round Line Hook Steel Weight

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691#

1 Bar        "        L. 13' 1"        W. 178#

1 "        "        " 12'  $11\frac{1}{2}$ "        " 175#

1 "        "        " 12' 3"        " 167#

1 "        "        " 12'  $11\frac{1}{2}$ "        " 177#

4 Bars        L. 51' 3"        W. 697#

2 Bars  $5/16 \times 14$  Block Side Steel Weight

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650#

1 Bar        "        L. 11'  $11\frac{1}{4}$ "        W. 170#

1 "        "        L. 11'  $11\frac{1}{4}$ "        " 171#

1 "        "        L. 11'  $11\frac{1}{4}$ "        " 170#

1 "        "        L. 10' 1"        " 151#

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4 Bars        "        L. 43'  $4\frac{3}{4}$ "        W. 662#

2 Bars  $2\frac{3}{4}$ " Sledge Steel Weight

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1165

1 "        "        L. 11' 2"        W. 293#

1 "        "        " 11' 1"        " 290#

1 "        "        " 11' 2"        " 295#

1 "        "        " 11'  $11\frac{1}{2}$ "        " 295#

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4 Bars        "        L. 44'  $6\frac{1}{2}$ "        " 1173#



2 Bars 2" Round Piston Rod Steel Weight

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					320#
1 Bar	"	L. 7'	41½"	W.	80#
1 Bar	"	" 7'	2"	"	81#
1 Bar	"	" 7'	61½"	"	81#
1 Bar	"	" 7'	51½"	"	80#
<hr/>					
4 Bars	"	" 29'	61½"	"	322#

2 Bars 2½" Round Piston Rod Steel Weight

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					742#
1 Bar	"	L. 11'	81¼"	W.	197#
1 "	"	" 11'	1"	"	182#
1 "	"	" 11'	5¾"	"	195#
1 "	"	" 10'	5¾"	"	178#
<hr/>					
4 Bars	"	L. 44'	8¾"	W.	752#

2 Bars 1 13/16" Round Piston Rod Steel Weight

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					471#
1 Bar	"	L. 13'	6¾"	W.	120#
1 "	"	" 13'	4"	"	119#
1 "	"	" 13'	2¼"	"	116#
1 "	"	" 13'	4½"	"	119#
<hr/>					
4 Bars	"	L. 53'	5½"	W.	474#

1 Bar  $1\frac{1}{4}$ " Round Valve Rod Steel Weight

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107#

1 Bar        "        L. 11' 7"        W. 50#

1 "        "        " 11' 6"        " 50#

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2 Bars        "        L. 23' 1"        W. 100#

1 Bar  $7/16 \times 3\frac{1}{2}$ " Locomotive Spring Steel Weight

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112#

1 Bar        "        L. 11' 1"        W. 57#

1 "        "        " 10'  $11\frac{1}{4}$ "        " 57#

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2 Bars        "        L. 22'  $1\frac{1}{4}$ "        W. 114#

25 Bars 1x2 Dog Hook Steel Weight

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3605#

1 Bar        "        10'  $7\frac{1}{2}$ "        W. 75#

1 "        "        10' 5"        " 74#

1 "        "        10'  $5\frac{3}{4}$ "        " 74#

1 "        "        10'  $6\frac{1}{2}$ "        " 74#

1 "        "        10'  $7\frac{1}{4}$ "        " 74#

1 "        "        10'  $1\frac{1}{4}$ "        " 75#

1 "        "        10' 8"        " 74#

1 "        "        10'  $10\frac{1}{4}$ "        " 75#

1 "        "        10'  $8\frac{1}{2}$ "        " 75#

1 "        "        10'  $7\frac{1}{2}$ "        " 74#

1 "        "        10'  $6\frac{1}{2}$ "        " 74#

1 "        "        10' 8"        " 74#

1 "        "        10' 6"        " 74#

1 "        "        10' 8"        " 74#

1 "        "        10'  $6\frac{3}{4}$ "        " 74#

1 "        "        10'  $6\frac{1}{2}$ "        " 74#

1	"	"	10' 7"	"	74#
1	"	"	10' 7"	"	74#
1	"	"	10' 8"	"	74#
1	"	"	10' 6 $\frac{1}{4}$ "	"	73#
1	"	"	10' 7 $\frac{1}{2}$ "	"	74#
1	"	"	10' 5"	2	73#
1	"	"	10' 7 $\frac{3}{4}$ "	"	74#
1	"	"	10' 11"	"	75#
1	"	"	10' 8 $\frac{3}{4}$ "	"	74#
1	"	"	10' 8 $\frac{1}{2}$ "	"	73#
1	"	"	10' 9 $\frac{1}{4}$ "	"	75#
1	"	"	10' 9"	"	74#
1	"	"	10' 7"	"	72#
1	"	"	10' 10"	"	73#
1	"	"	10' 8"	"	73#
1	"	"	10' 8 $\frac{1}{4}$ "	"	73#
1	"	"	10' 8 $\frac{1}{2}$ "	"	73#
1	"	"	10' 9"	"	75#
1	"	"	10' 9 $\frac{1}{2}$ "	"	75#
1	"	"	10' 10 $\frac{1}{4}$ "	"	75#
1	"	"	10' 8"	"	74#
1	"	"	10' 5 $\frac{1}{2}$ "	"	71#
1	"	"	10' 10"	"	75#
1	"	"	10' 7 $\frac{3}{4}$ "	"	73#
1	"	"	10' 9"	"	74#
1	"	"	10' 7"	"	71#
1	"	"	10' 6 $\frac{1}{2}$ "	"	73#
1	"	"	10' 7"	"	73#
1	"	"	10' 7 $\frac{1}{2}$ "	"	73#
1	"	"	10' 7"	"	73#
1	"	"	10' 10 $\frac{1}{2}$ "	"	75#

1	"	"	10'	6 $\frac{1}{2}$ "	"	73#
1	"	"	10'	8 $\frac{1}{2}$ "	"	73#
1	"	"	10'	9 $\frac{1}{2}$ "	"	74#

50 Bars      "      532 Ft. 10"      W. 3689#

1 Bar of  $\frac{5}{8}$ " Oct. Cold Chisel teal      Weight  
 21#

1 Bar      "      9' 4 $\frac{1}{2}$ "      W. 11#

2 Bars of Oct. Cold Chisel Steel  $\frac{3}{4}$ "      Weight  
 74#

1	Bar	"	12'	4"	W.	31#
1	"	"	11'	5"	"	17#
1	"	"	11'	5"	"	17#
1	"	"	12'	2 $\frac{1}{2}$ "	"	20#

4 Bars      "      47' 4 $\frac{1}{2}$ "      " 75#

2 Bars 2" Square Track Chisel Steel      Weight  
 612#

1	Bar	"	11'	1"	W.	153#
1	"	"	10'	6 $\frac{1}{2}$ "	"	145
1	"	"	11"	11"	"	170#
1	"	"	10'	9"	"	149#

4 Bars      "      44' 3 $\frac{1}{2}$ "      " 617#

2 Bars 1 $\frac{1}{2}$ " Square Track Chisel Steel      Weight  
 402#

1	Bar	"	13'	11 $\frac{1}{4}$ "	"	110#
1	"	"	12'	2 $\frac{1}{4}$ "	"	95#
1	"	"	13'	11 $\frac{1}{4}$ "	"	102#
1	"	"	12'	6 $\frac{1}{2}$ "	"	99#

4 Bars      "      51' 9 $\frac{1}{4}$ "      " 406#



2 Bars 1 $\frac{3}{8}$ " Square Track Chisel Steel Weight

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287#

1 Bar	"	11' 6"	"	75#
1 "	"	10' 1 $\frac{1}{2}$ "	"	72#
1 "	"	10' 5 $\frac{1}{2}$ "	"	70#
1 "	"	11' 4"	"	74#

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4 Bars " 44' 1" W. 291#

2 Bars 1 $\frac{1}{4}$ " Square Track Chisel Steel Weight

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235#

1 Bar	9' 8"	"	9' 8"	"	50#
1 "	9' 2"	"	9' 2"	"	50#
1 "		"	11' 11 $\frac{1}{2}$ "	"	67#
1 "		"	12' 1 $\frac{1}{2}$ "	"	67#

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4 Bars " 42' 10" W. 234#

1 Bar 3" Splitting Wedge Steel Weight

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730#

1 Bar	"	11' 10"	"	366#
1 "	"	11' 10"	"	365#

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2 Bars " 23' 8" " 731#

12 Bars 1x3 F & B Wedge Steel Weight

1 Bar " 94"

12 Bars 1x3 F. & B. Wedge Steel Weight

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2300#

1 Bar	"	9' 4"	W.	95#
1 "	"	9' 6 $\frac{1}{2}$ "	"	98#
1 "	"	9' 2 $\frac{1}{2}$ "	"	95#
1 "	"	9' 4 $\frac{1}{4}$ "	"	96#

1	"	"	9'	5 $\frac{3}{4}$ "	"	95#
1	"	"	9'	5 $\frac{1}{4}$ "	"	95#
1	"	"	9'	6 $\frac{1}{4}$ "	"	96#
1	"	"	9'	5 $\frac{1}{4}$ "	"	96#
1	"	"	9'	1"	"	93#
1	"	"	9'	7"	"	94#
1	"	"	9'	9 $\frac{1}{4}$ "	"	98#
1	"	"	9'	6"	"	95#
1	"	"	9'	6"	"	95#
1	"	"	9'	4 $\frac{1}{4}$ "	"	95#
1	"	"	9'	6 $\frac{3}{4}$ "	"	96#
1	"	"	12'	2"	"	123#
1	"	"	9'	8"	"	97#
1	"	"	9'	5 $\frac{1}{2}$ "	"	95#
1	"	"	9'	5"	"	94#
1	"	"	9'	5 $\frac{1}{4}$ "	"	94#
1	"	"	9'	6"	"	96#
1	"	"	11'	11 $\frac{1}{2}$ "	"	120#
1	"	"	8'	4 $\frac{1}{2}$ "	"	85#
1	"	"	9'	7"	"	96#

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24 Bars      "      231 Ft. 2 $\frac{3}{4}$ "      "      2332#

12 Bars  $\frac{7}{8}$ " Round Cold Shut Steel      Weight

562#

1 Bar	"	12"	"	+
4 "	"	11'	6 $\frac{1}{2}$ "	+
4 "	"	11'	3 $\frac{1}{2}$ "	+
4 "	"	9'	7 $\frac{1}{2}$ "	+
4 "	"	9'	7 $\frac{3}{4}$ "	+
4 "	"	11'	3 $\frac{1}{2}$ "	+

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6 Bars

65 Ft. 4 $\frac{3}{4}$ " W. 139#

1 Bar  $\frac{7}{8}$ " Round Cold Steel

1	"	"	11'	7 $\frac{1}{2}$ "
1	"	"	9'	7 $\frac{1}{2}$ "
1	"	"	9'	5 $\frac{1}{2}$ "
1	"	"	11'	11 $\frac{3}{4}$ "
1	"	"	11'	1"
1	"	"	11'	5"

12 Bars  $\frac{7}{8}$ " Round Cold Shut Steel

Weight

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562#

1 Bar	"	12'	)	
1 "	"	11'	6 $\frac{1}{2}$ "	)
1 "	"	11'	3 $\frac{1}{2}$ "	)
1 "	"	9'	7 $\frac{1}{2}$ "	)
1 "	"	9'	7 $\frac{3}{4}$ "	)
1 "	"	11'	3 $\frac{1}{2}$ "	) W. 139#
1 "	"	11'	7 $\frac{1}{2}$ "	)
1 "	"	9'	7 $\frac{1}{2}$ "	)
1 "	"	9'	5 $\frac{1}{2}$ "	)
1 "	"	11'	11 $\frac{3}{4}$ "	)
1 "	"	11'	1"	)
1 "	"	11'	5"	) W. 137#
1 "	"	12'	1 $\frac{1}{2}$ "	)
1 "	"	12'	1 $\frac{1}{2}$ "	)
1 "	"	11'	4 $\frac{1}{2}$ "	)
1 "	"	11'	2 $\frac{1}{2}$ "	)
1 "	"	11'	2 $\frac{1}{2}$ "	)
1 "	"	11'	1 $\frac{1}{2}$ "	) W. 145#

1	"	"	11'	7"	)	
1	"	"	12'		)	
1	"	"	11'	2"	)	
1	"	"	11'	9½"	)	
1	"	"	11'	4"	)	
1	"	"	11'	5"	)	W. 146#

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24 Bars                      "      268 Ft. 101½"      W. 567#

12 Bars 1" Round Cold Shut Steel                      Weight

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870#

1 Bar	"	10'	7½"	)	
1	"	"	11'	9"	)
1	"	"	11'	9"	)
1	"	"	11'	9¼"	) W. 125#
1	"	"	12'	3"	)
1	"	"	12'	10½"	)
1	"	"	12'	4"	)
1	"	"	12'	5¼"	) W. 184#
1	"	"	12'	10"	)
1	"	"	12'	3"	)
1	"	"	12'	2"	)
1	"	"	12'	3 "	)
1	"	"	12'	4"	)
1	"	"	12'	5"	) W. 180#
1	"	"	12'	10"	)
1	"	"	12'	2"	)
1	"	"	12'	4"	)
1	"	"	12'	11"	)
1	"	"	12'	11¼"	) W. 184#
1	"	"	12'	3"	)
1	"	"	12'	1"	)
1	"	"	12'	4"	)



1	"	"	12' 8"	) W. 145#
1	"	"	12' 3"	) W. 36#
<hr/>				
24 Bars	"		293' 11 $\frac{3}{4}$ "	W. 854#
12 Bars 1 $\frac{1}{8}$ "	Round Cold Shut Steel			Weight.
				<hr/>
				1110#
1 Bar	"		13' 11 $\frac{1}{2}$ "	)
1	"	"	12' 10 $\frac{1}{2}$ "	)
1	"	"	14'	) W. 142#
1	"	"	13' 4 $\frac{3}{4}$ "	)
1	"	"	13' 4 $\frac{3}{4}$ "	)
1	"	"	13' 3 $\frac{1}{2}$ "	) W. 136#
1	"	"	13' 11"	)
1	"	"	13' 11 $\frac{1}{2}$ "	)
1	"	"	14'	) W. 145#
1	"	"	13' 4 $\frac{1}{2}$ "	)
1	"	"	12' 11 $\frac{1}{2}$ "	)
1	"	"	13' 2"	) W. 135#
1	"	"	13' 11 $\frac{1}{2}$ "	)
1	"	"	13' 8"	)
1	"	"	14'	) W. 143#
1	"	"	13' 1"	)
1	"	"	14' 0"	)
1	"	"	14'	) W. 141#
1	"	"	14'	)
1	"	"	14'	)
1	"	"	13' 11 $\frac{1}{2}$ "	) W. 143#
1	"	"	14'	)
1	"	"	13' 2"	)
1	"	"	14' 0"	) W. 141#
<hr/>				
24 Bars	"		328 Ft. 11 $\frac{1}{2}$ "	W. 1126#

250 Ft.  $1\frac{1}{4} \times 6$  Draw Head Steel.

Weighth.

5985 #

1 Bar	"	9' 8"	W. 245 #
1 "	"	9' 7"	" 243 #
1 "	"	9' $3\frac{1}{2}$ "	" 236 #
1 "	"	9' $7\frac{1}{2}$ "	" 245 #
1 "	"	9' $4\frac{1}{4}$ "	" 238 #
1 "	"	10'	" 255 #
1 "	"	9' $5\frac{1}{2}$ "	" 240 #
1 "	"	9' $6\frac{1}{2}$ "	" 245 #
1 "	"	9' $3\frac{1}{2}$ "	" 235 #
1 "	"	9' $8\frac{1}{4}$ "	" 245 #
1 "	"	9' 6"	" 242 #
1 "	"	9' $3\frac{1}{2}$ "	" 236 #
1 "	"	9' 2"	" 231 #
1 "	"	9' $3\frac{1}{4}$ "	" 237 #
1 "	"	9' $\frac{1}{4}$	" 230 #
1 "	"	9' $3\frac{1}{4}$ "	" 236 #
1 "	"	9' $3\frac{1}{2}$ "	" 239 #
1 "	"	9' $5\frac{1}{2}$ "	" 243 #
1 "	"	9' 9"	" 250 #
1 "	"	9' 7"	" 245 #
1 "	"	9' 8"	" 243 #
1 "	"	9' $10\frac{1}{2}$ "	" 250 #
1 "	"	9' $4\frac{1}{2}$ "	" 238 #
1 "	"	9' $10\frac{1}{4}$ "	" 251 #
1 "	"	9' $2\frac{1}{2}$ "	" 235 #

25 Bars

" 236 Ft. 1"

W. 6032 #

1 Bar 3" Square Die Steel Ann	Weight.	
		257 #
1 " " 8' 3" W. 260 #		
1 Bar 4" Square Die Steel Ann.	.Weight	
		446 #
1 " " 8' 11½ W. 449 #		
50 Bars ¾" Round Cold Shut Steel.	Weight.	
		1620 #
1 Bar " 7' 9¼" )		
1 " " 10' 4" )		
1 " " 9' 5½" )		
1 " " 10' 2½" )		
1 " " 10' 4" )		
1 " " 11' 2½" )		
1 " " 9' 8½" )		
1 " " 10' 9½" ) W. 120 #		
1 " " 11' 10¼" )		
1 " " 8' 2" )		
1 " " 15' 4" )		
1 " " 11' 11" )		
1 " " 8' 3¾" ) W. 85 #		
1 " " 10' 3" )		
1 " " 10' 3" )		
1 " " 11' 2" )		
1 " " 9' 11" )		
1 " " 9' 7¾" )		
1 " " 9' 10½" )		
1 " " 9' 11" )		
1 " " 10' 4½" ) W. 126 #		

1	"	"	10'	11½"	)	
1	"	"	10'	9"	)	
1	"	"	10'	1"	)	
1	"	"	9'		)	
1	"	"	11'	1"	)	
1	"	"	9'	4"	)	
1	"	"	10'	6¼"	)	
1	"	"	10'	3"	)	W. 121#
1	"	"	12'	½"	)	
1	"	"	8'	7¾"	)	
1	"	"	9'	6"	)	
1	"	"	12'	5½"	)	
1	"	"	13'	11½"	)	
1	"	"	14'	8"	)	W. 106#
1	"	"	12'	8"	)	
1	"	"	12'	9½"	)	
1	"	"	15'		)	
1	"	"	14'	9"	)	
1	"	"	15'	11½"	)	
1	"	"	12'	8½"	)	
1	"	"	11'	4"	)	
1	"	"	14'	3½"	)	W. 164#
1	"	"	9'	11"	)	
1	"	"	9'	7"	)	
1	"	"	10'	4"	)	
1	"	"	10'	11½"	)	
1	"	"	9'	6"	)	
1	"	"	10'	2"	)	
1	"	"	9'	2"	)	
1	"	"	10'	4"	)	W. 122#



50 Bars  $\frac{3}{4}$ " Round Cold Shut Steel Continued.

1 Bar	"	12'	8 $\frac{1}{2}$ "	)	
1 "	"	10'	9 $\frac{1}{2}$ "	)	
1 "	"	12'	5"	)	
1 "	"	12'	9"	)	
1 "	"	9'	10 $\frac{1}{2}$ "	)	
1 "	"	8'	5 $\frac{1}{2}$ "	)	
1 "	"	10'	4 $\frac{1}{2}$ "	)	
1 "	"	10'		)	W. 135#
1 "	"	10'	3 $\frac{1}{2}$ "	)	
1 "	"	10'	6"	)	
1 "	"	10'	11"	)	
1 "	"	10'	2"	)	
1 "	"	10'		)	
1 "	"	10'	3"	)	
1 "	"	10'	1"	)	
1 "	"	9'	9"	)	W. 127#
1 "	"	11'	2 $\frac{1}{2}$ "	)	
1 "	"	11'	7"	)	
1 "	"	11'	11"	)	
1 "	"	12'	3"	)	
1 "	"	12'	11 $\frac{1}{4}$ "	)	
1 "	"	11'	10"	)	
1 "	"	9'	1 $\frac{1}{2}$ "	)	
1 "	"	11'	10"	)	W. 135#
1 "	"	9'	7 $\frac{1}{2}$ "	)	
1 "	"	9'	5"	)	
1 "	"	10'	5 $\frac{1}{2}$ "	)	
1 "	"	11'	3"	)	
1 "	"	9'	11"	)	
1 "	"	10'	9"	)	
1 "	"	10'	10"	)	
1 "	"	9'	7"	)	W. 127#

*Polson Logging Company*

1 "	"	9' 6 $\frac{3}{4}$ "	)	
1 "	"	12' 1 $\frac{1}{2}$ "	)	
1 "	"	10' 1"	)	
1 "	"	9' 1"	)	
1 "	"	10' 2"	)	
1 "	"	10' 4"	)	
1 "	"	9' 5 $\frac{1}{2}$ "	)	
1 "	"	8' 3"	)	W. 120#
1 "	"	11' 7"		W. 18#
1 "	"	9' 6 $\frac{1}{2}$ "		" 15#
1 "	"	11' 1 $\frac{1}{2}$ "		" 16#
1 "	"	14' 8 $\frac{1}{2}$ "		" 22#
1 "	"	11' 9"		" 18#
1 "	"	9' 11 $\frac{1}{4}$ "		" 15#
1 "	"	10' 10 $\frac{1}{2}$ "		" 16#
1 "	"	10' 5 $\frac{1}{2}$ "		" 15#
1 "	"	11' 5"		" 17#
<hr/>				
49 Bars		522 Ft. 4 $\frac{3}{4}$ "		" 796#
51 Bars		555 " 11"		" 844#
<hr/>				
100 Bars		1078 " 3 $\frac{3}{4}$ "		" 1640#
12 Bars 11 $\frac{1}{4}$ " Cold Shut Steel				Weight
				<hr/>
1 Bar	"	11' 4"	W.	50#
1 "	"	11' 11 $\frac{1}{2}$ "	"	49#
1 "	"	11' 21 $\frac{1}{2}$ "	"	49#
1 "	"	11' 51 $\frac{1}{2}$ "	"	49#
1 "	"	11' 21 $\frac{1}{2}$ "	"	50#
1 "	"	11' 8"	"	50#
1 "	"	11' 61 $\frac{1}{2}$ "	"	49#
1 "	"	11' 3"	"	49#
1 "	"	11' 1"	"	47#

1	"	"	11'	6 $\frac{1}{2}$ "	"	49#
1	"	"	11'	5 $\frac{1}{2}$ "	"	49#
1	"	"	11'	3 $\frac{1}{2}$ "	"	48#
1	"	"	11'	6 $\frac{1}{4}$ "	"	49#
1	"	"	11'	6 $\frac{1}{2}$ "	"	49#
1	"	"	11'	6 $\frac{1}{2}$ "	"	49#
1	"	"	11'	3"	"	48#
1	"	"	11'	5"	"	48#
1	"	"	11'	6"	"	50#
1	"	"	11'	5 $\frac{1}{4}$ "	"	49#
1	"	"	11'	2"	"	47#
1	"	"	14'	2 $\frac{1}{4}$ "	"	60#
1	"	"	11'	6"	"	49#
1	"	"	11'	2 $\frac{1}{2}$ "	"	49#
1	"	"	11'	5 $\frac{1}{2}$ "	"	49#

---

24 Bars                      275 Ft. 10 $\frac{3}{4}$ "    " 1184#

2 Bars 1" Roller Bearing Steel                      Weight

---

123#

1 Bar	"	13'	1"	"	39#
1 "	"	12'	9"	"	37#
1 "	"	13'	3"	"	39#

---

3 Bars                      39 Ft. 1"    W. 115#

1 Bar 1 $\frac{7}{8}$ " Oct. Steel    11' 10" Weight 119#

[Endorsed]: No. 1507. United States District Court, Western District of Washington. Neumeyer & Dimond vs. Polson Logging Co. Defendants' Exhibit "C."

No. 2584. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit "C." Received and filed Mch. 18, 1915. F. D. Monckton, Clerk.

**[Defendants' Exhibit "D"—Account-Book.]**

[Endorsed]: No. 1507 United States District Court, Western District of Washington. Neumeyer & Dimond vs. Polson Logging Company. Defendants' Exhibit D.

No. 2584. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit D. Received and filed Mch. 18, 1915. F. D. Monekton, Clerk.



$1\frac{1}{2} \times 2\frac{1}{2}$

13 2"  
12  $7\frac{1}{2}$   
13  $\frac{1}{2}$   
13 1  
13 1  
12 3

Total 77 3"

77  $2\frac{1}{4}$

2" Round

7 6  
7  $5\frac{1}{2}$   
7  $6\frac{1}{4}$   
7 5  
12  $2\frac{1}{2}$   
12  $2\frac{1}{2}$   
11  $8\frac{1}{2}$   
12  $2\frac{1}{2}$

Total 78  $2\frac{3}{4}$

77 11"

$1\frac{3}{8}$  Round

14  $4\frac{3}{4}$   
14  $1\frac{3}{4}$   
14  $1\frac{1}{2}$   
14 4

Total 57 - 0"

57  $1\frac{1}{2}$ "

$2\frac{1}{4}$ " Round

12 3  
12  $11\frac{1}{4}$   
13  $\frac{3}{4}$   
12 11  
12 3  
12  $2\frac{1}{2}$

Total 75  $7\frac{1}{2}$

75  $8\frac{1}{2}$

[illegible]

$2\frac{1}{2}$  Round

12  $8\frac{1}{2}$   
 11  $5\frac{1}{2}$   
 10 6  
 11 1  
 11  $8\frac{3}{4}$   
 11  $4\frac{1}{2}$   
 11  $8\frac{1}{2}$   
 11  $3\frac{1}{4}$

---

Total 91 10"

91 11

$5/16 \times 14$

10 1  
 11  $11\frac{1}{2}$   
 11 2  
 11  $11\frac{1}{2}$

---

Total 43 6"

43  $4\frac{3}{4}$

$2\frac{3}{4}$  Square

11 2  
 11 2  
 11 0  
 11 2

---

Total 44 6"

44  $6\frac{1}{2}$

1  $13/16$  Round

13 5  
 13  $3\frac{3}{4}$   
 13  $4\frac{3}{4}$   $1\frac{3}{4}$   
 13  $2\frac{1}{4}$

---

Total 53 3"

53  $5\frac{1}{2}$

$7/16 \times 3\frac{1}{2}$

11  $11\frac{1}{2}$   
 10  $11\frac{1}{2}$

---

Total 22  $1\frac{1}{2}$ "

22  $1\frac{1}{4}$

1x2

10	7	10	71 $\frac{1}{2}$
10	9	10	101 $\frac{1}{2}$
10	81 $\frac{1}{4}$	10	63 $\frac{3}{4}$
10	91 $\frac{1}{2}$	10	71 $\frac{1}{4}$
10	71 $\frac{1}{2}$	10	61 $\frac{1}{4}$
10	81 $\frac{1}{2}$	10	81 $\frac{1}{4}$
10	83 $\frac{3}{4}$	10	91 $\frac{1}{4}$
10	83 $\frac{3}{4}$	10	61 $\frac{1}{2}$
10	81 $\frac{1}{4}$	10	8
10	81 $\frac{1}{2}$	10	5
10	61 $\frac{1}{2}$	10	53 $\frac{3}{4}$
10	81 $\frac{1}{4}$	10	93 $\frac{3}{4}$
10	73 $\frac{3}{4}$	10	83 $\frac{3}{4}$
10	7	10	71 $\frac{1}{2}$
10	11	10	101 $\frac{1}{2}$
10	91 $\frac{1}{4}$	10	7
10	8	10	71 $\frac{1}{2}$
10	81 $\frac{1}{2}$	10	101 $\frac{1}{4}$
10	7	10	6
10	5	10	63 $\frac{3}{4}$
10	101 $\frac{1}{2}$	10	61 $\frac{1}{2}$
10	8	10	101 $\frac{1}{4}$
10	73 $\frac{3}{4}$	10	61 $\frac{1}{2}$
10	81 $\frac{1}{4}$	10	61 $\frac{1}{2}$
10	8	10	71 $\frac{1}{4}$
Total two Columns			

250

532 ft. 33 $\frac{3}{4}$ "

250

5/8 Oct

532 10"

9 5

9 41 $\frac{1}{2}$



	$\frac{3}{4}$	Oct
12	$2\frac{1}{2}$	
12	4	
11	5	

Total	35	$11\frac{1}{2}$	47	$4\frac{1}{2}$
-------	----	-----------------	----	----------------

	2"	Square
11	$10\frac{1}{2}$	
10	$9\frac{1}{4}$	
11	1	
10	$6\frac{3}{4}$	

Total	44	$3\frac{1}{2}$ "	44	$3\frac{1}{2}$
-------	----	------------------	----	----------------

	$11\frac{1}{2}$ "	Square
12	3	
13	$\frac{3}{4}$	
13	$11\frac{1}{2}$	2
12	$6\frac{3}{4}$	

Total	51	10"	51	$9\frac{1}{4}$
-------	----	-----	----	----------------

	$1\frac{3}{8}$	Square
11	4	
10	$5\frac{1}{2}$	
10	$9\frac{1}{2}$	$25\frac{1}{4}$
11	$6\frac{1}{4}$	

Total	44	$1\frac{1}{4}$	44	1
-------	----	----------------	----	---

	$11\frac{1}{4}$	Square
9	2	
9	8	
12	0	
12	0	

Total	42	10	42	10
-------	----	----	----	----

3" Square

11 9 $\frac{1}{2}$ 11 9 $\frac{1}{2}$ 

8 3

22

---

 31" 10"

31 11

1x3

9 4 $\frac{3}{4}$ 9 4 $\frac{1}{4}$ 8 4 $\frac{1}{4}$ 9 9 $\frac{1}{4}$ 

9 6

9 6 $\frac{3}{4}$ 9 5 $\frac{3}{4}$ 

9 7

11 11 $\frac{1}{4}$ 9 5 $\frac{3}{4}$ 

9 4

9 4 $\frac{1}{2}$ 

9 8

9 5 $\frac{1}{4}$ 

9 6

12 2

9 6 $\frac{1}{4}$ 9 6 $\frac{1}{2}$ 9 5 $\frac{1}{4}$ 

9 7

9 2 $\frac{1}{2}$ 

9 1

9 5 $\frac{3}{4}$ 

9 5

---

 231 ft 2"
231 2 $\frac{3}{4}$

$\frac{7}{8}$  Round

11	$11\frac{3}{4}$
11	$6\frac{1}{2}$
11	$11\frac{1}{2}$
11	$4\frac{3}{4}$
11	$4\frac{1}{4}$
11	2
11	$2\frac{1}{4}$
12	$1\frac{1}{2}$
11	$3\frac{1}{4}$
11	2
11	$3\frac{1}{2}$
12	0
11	$11\frac{1}{2}$
11	$7\frac{1}{2}$
11	7
11	$9\frac{1}{2}$
12	0
11	5
11	1
11	4
9	$7\frac{1}{2}$
9	$5\frac{1}{2}$
9	$7\frac{1}{2}$
9	$7\frac{3}{4}$

---

268 ft 8"

268  $10\frac{1}{2}$

1" Round

12	$10\frac{3}{4}$
12	$3\frac{3}{4}$
12	$11\frac{1}{2}$
12	10
12	2
12	$4\frac{3}{4}$
12	$5\frac{1}{4}$
13	3
12	$3\frac{1}{2}$
12	4
12	2
13	1
11	$9\frac{1}{4}$
10	$7\frac{1}{2}$
12	$8\frac{1}{2}$
12	$10\frac{1}{4}$
12	8
12	$2\frac{1}{2}$
12	3
12	$4\frac{1}{2}$
12	$10\frac{1}{2}$
11	9
12	3
11	$9\frac{1}{4}$
12	1
12	4
12	$2\frac{3}{4}$

---

 333     $1\frac{1}{2}"$ 
333     $\frac{3}{4}"$



$11\frac{1}{8}$  Round

14 0  
 14 0  
 13  $11\frac{1}{2}$   
 13  $11\frac{1}{2}$   
 14 0  
 13  $10\frac{3}{4}$   
 13  $11\frac{3}{4}$   
 13 8  
 13  $11\frac{1}{2}$   
 13  $2\frac{1}{4}$   
 14 0  
 13  $11\frac{3}{4}$   
 14 0  
 13  $1\frac{3}{4}$   
 12  $11\frac{1}{4}$   
 13  $4\frac{1}{4}$   
 13  $3\frac{1}{2}$   
 13  $4\frac{3}{4}$   
 12  $10\frac{3}{4}$   
 14 0  
 13  $4\frac{3}{4}$   
 13 1  
 13  $11\frac{3}{4}$   
 13  $11\frac{1}{2}$

---

328 ft.  $1\frac{1}{4}$ "

328  $11\frac{1}{2}$

		$\frac{3}{4}$ Rd				
10	$11\frac{1}{4}$	12—1	7	$9\frac{1}{2}$	11	7
10	4	9— $5\frac{3}{4}$	9	$4\frac{1}{4}$	11	10
10	$4\frac{1}{2}$	10— $5\frac{1}{2}$	9	$5\frac{1}{2}$	10	2
10	1	12—3	11	$2\frac{1}{2}$	10	$4\frac{1}{2}$
8	4	10— $9\frac{1}{2}$	10	$2\frac{1}{4}$	10	$3\frac{1}{2}$
9	11	9— $6\frac{1}{2}$	9	$11\frac{1}{4}$	11	7
9	$1\frac{1}{2}$	10— $11\frac{1}{2}$	9	6	10	$10\frac{1}{2}$
11	10	13—2	11	$1\frac{1}{2}$	10	4
11	9	14—8	9	$11\frac{1}{2}$	10	$3\frac{1}{2}$
12	$1\frac{1}{2}$	11 2	9	1	14	$3\frac{3}{4}$
10	$6\frac{1}{2}$	14 8	9	11	9	11
11	11		11	10	9	7
9	10		9	$11\frac{1}{2}$	10	$11\frac{1}{2}$
9	8		12	8	11	3
10	3		10	$9\frac{3}{4}$	11	2
9	$1\frac{1}{2}$		11	11	14	9
12	9		9	$6\frac{3}{4}$	12	5
10	3		9	$10\frac{1}{4}$	10	$9\frac{1}{4}$
9	4		10	11	10	$5\frac{1}{2}$
12	$1\frac{1}{4}$		12	$8\frac{1}{2}$	10	$5\frac{1}{4}$
10	9		14	$11\frac{3}{4}$	9	9
11	4		15	$11\frac{1}{2}$	12	$9\frac{1}{4}$
10	2		12	5	8	$5\frac{1}{2}$
10	$4\frac{1}{2}$		10	3	8	$7\frac{1}{2}$
9	2		15	$4\frac{3}{4}$	11	$2\frac{1}{4}$
9	5		12	$8\frac{1}{2}$	9	$4\frac{1}{2}$
10	1		10	$10\frac{1}{2}$	9	$10\frac{1}{2}$
8	2		11	$3\frac{1}{2}$	9	7
9	$7\frac{1}{4}$		10	$11\frac{1}{2}$	9	11
9	$8\frac{1}{2}$		9	$10\frac{1}{4}$	8	3

Total  
 1087 ft 7"  
 1078— $3\frac{3}{4}$

$17\frac{7}{8}$  Oct  
 $11-10''$   
 $11\frac{1}{4} \times 6$   
 9 9  
 9  $6\frac{1}{2}$   
 9 5  
 9 8  
 9 7  
 9  $7\frac{1}{2}$   
 9 10  
 9 3  
 9  $3\frac{1}{2}$   
 9 2  
 9 6  
 9  $10\frac{3}{4}$   
 9  $1\frac{1}{2}$   
 9  $3\frac{1}{4}$   
 9  $3\frac{1}{2}$   
 9  $6\frac{1}{2}$   
 9  $3\frac{1}{2}$   
 9  $3\frac{1}{4}$   
 9 7  
 9  $8\frac{1}{2}$   
 9  $11\frac{1}{2}$   
 9 7  
 9  $4\frac{1}{2}$   
 9  $5\frac{1}{2}$   
 9  $3\frac{1}{2}$

---

Total  $237' 21\frac{1}{4}''$   
            $4''$  Sq  
 8  $11\frac{1}{2}$

236 1"

8  $11\frac{1}{2}$   
 GEO. J. FLURSHUTZ,  
 715 Maple St.,  
 Hoquiam, Wash.

~~2ft.~~      ~~2" Sq.~~~~11-10 $\frac{1}{2}$~~ ~~10-9 $\frac{1}{4}$~~ ~~2 $\frac{3}{4}$  Sq.~~~~11-0~~~~11-2~~~~3" Sq.~~~~11-9 $\frac{1}{2}$~~       ~~8-3~~~~11-9 $\frac{1}{2}$~~ ~~4" Sq.~~~~8 ft. 1 $\frac{1}{2}$ "~~~~5/16x14~~~~10-1~~~~11-1 $\frac{1}{2}$~~ ~~11-2~~~~11-1 $\frac{1}{2}$~~ ~~25 Bars 1 $\frac{1}{4}$ x6~~~~9-9~~~~9-6 $\frac{1}{2}$~~ ~~9-5~~~~9-8~~~~9-7~~~~9-7 $\frac{1}{2}$~~ ~~9-10~~~~9-3~~~~9-3 $\frac{1}{2}$~~ ~~9-2~~~~9-6~~



$$\cancel{9-10\frac{3}{4}}$$

$$\cancel{9-\frac{1}{2}}$$

$$\cancel{9-3\frac{1}{4}}$$

$$\cancel{9-3\frac{1}{2}}$$

$$\cancel{9-6\frac{1}{2}}$$

$$\cancel{9-3\frac{1}{2}}$$

$$\cancel{9-3\frac{1}{4}}$$

$$\cancel{9-7}$$

$$\cancel{9-8\frac{1}{2}}$$

$$\cancel{9-11\frac{1}{2}}$$

$$\cancel{9-7}$$

$$\cancel{9-4\frac{1}{2}}$$

$$\cancel{9-5\frac{1}{2}}$$

$$\cancel{9-3\frac{1}{2}}$$

$$2 \text{ Bars } 2\frac{3}{4} \text{ Sq.}$$

$$\cancel{11-2}$$

$$\cancel{11-2}$$

$$\cancel{11\frac{1}{4}-4\frac{1}{2}}$$

$$\cancel{12-11}$$

$$\cancel{12-7}$$

## [Defendants' Exhibit "E"—Invoice (Copy).]

COPY.

NEUMEYER &amp; DIMOND,

NEW YORK, U. S. A.

February 6th, 1913.

Sold to Polson Logging Co.,  
Hoquiam, Wash.

Our Number	Your Number	Quantity	Size	Description	Weight	Approx. wgt. per foot.	Approx. length	Approx. length per bar.
2012	W-653	3	Bars 1½"x2½"	Swivel Steel.	972 lbs.	12.80	76 ft.	25 ft.
		2	" 2" Rd.	Clevis "	516 "	10.69	48 "	24 "
		2	" 1¾" Rd	" "	290 "	5.052	58 "	29 "
		1	" 2¼" "	Swivel Eye "	328 "	13.52	24 "	24 "
		7	" 1¼"x4½"	Choker Hook Steel.	3135 "	3.04	136 "	19 "
		2	" 1¼" Rd	Block "	233 "	4.175	56 "	28 "
		2	" 2½" "	" "	798 "	16.70	48 "	24 "
		2	" 2¼" "	Line "	691 "	13.52	51 "	52½ "
		2	" 5/16"x14"	Block (ends painted white)	650 "	14.78	44 "	22 "
		2	" 2¾" Sq.	Sledge Steel.	1165 "	25.73	45 "	22½ "
		2	" 2" Rd.	Piston Rod "	320 "	10.69	30 "	15 "
		2	" 2½" "	(ends painted white)	742 "	16.70	44 "	21 "
		2	" 1 13/16" Rd.	Piston Rod.	471 "	8.18	58 "	29 "
		1	" 1¼" Rd.	Valve Rod Steel	107 "	4.175	26 "	26 "
		1	" 7/16"x3½"	Locomotive Spring Steel.	112 "	5.175	21½ "	21½ "
		25	" 1"x2"	Dog Hook Steel.	3605 "	6.826	528 "	21 "
		1	" 5½" Oct.	Cold Chisel "	21 "	1.10	20 "	20 "
		2	" ¾" "	" "	74 "	1.58	48 "	24 "
		2	" 2" Sq.	Track "	612 "	13.61	45 "	22½ "
		2	" 1½" "	" "	402 "	7.655	52 "	26 "
		2	" 1¾" Sq.	" "	287 "	6.432	44 "	22 "
		2	" 1¼" "	" "	235 "	5.316	44 "	22 "

1	"	3"	"	Splitting Wedge Steel.	730	"	30.60	24	"	24	"
12	"	1"x3"	"	F. & B. Wedge Steel.	2300	"	10.24	224	"	18%	"
12	"	7/8"	Rd.	Cold Shut Steel.	562	"	2.046	274	"	23	"
12	"	1"	"	"	870	"	2.672	325	"	27	"
12	"	1 1/8"	"	"	1110	"	6.012	184	"	15 1/2 ft.	"
12	"	1 1/4"	"	"	1140	"	4.175	274	"	23	"
50	"	3/4"	Rd.	(ends painted red) Cold Shut Steel.	1620	"	1.503	1078	ft.	21	ft.
2	"	1"	"	Roller Bearing Steel.	123	"	2.672	46	"	23	"
250 ft.		1 1/4"x6"		(ends painted white) Draw Head Steel.	5985	"					
8	"	3"	Sq.	Bars cut in two. Die Steel, Ann.	30207	"	12 1/2¢	3775.88		8	"
8	"	4"		(ends painted white) Die Steel Ann.	257	"	30.60				
					446	"	54.45			8	"
					703	"	17¢	119.51			

\$3895.39

[Endorsed]: No. 1507. United States District Court, Western District of Washington. Neumeyer & Dimond vs. Polson Logging Co. Defendants' Exhibit "E," No. 2584. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit "E." Received and filed Mch. 18, 1915. F. D. Monckton, clerk.

**[Defendants' Exhibit "F"—Invoice.  
[Letter-head of Neumeyer & Dimond.]**

Sold to Polson Logging Co.,  
Hoquiam, Wash.

Shipped to  
E

Terms 10 days 2% 30 days net.

Our Year Quantity Size

Number Number

2012 W-653 3 Bars 1½"x2½"

2 " 2" Rd.

2 " 1¾" "

1 " 2¼" "

7 " 1¾"x4½" Rd.

2 " 1¼" Rd.

2 " 2½" "

2 " 2" "

2 " 5/16"x14"

2 " 2¾" Sq.

2 " 2" Rd.

2 " 2½" "

2 " 1 13/16" Rd.

1 " 1¼" Rd.

1 " 7/16"x3½"

25 " 1"x2"

1 " 5/8" Oct.

2 " 3/4" "

2 " 2" Sq.

2 " 1½" "

2 " 1¾" "

2 " 1¼" "

2 " 3" "

12 " 1"x3"

12 " 7/8" Rd.

12 " 1" "

12 " 1½" "

12 " 1¼" "

February 6th, 1913.

Weight	Price	Amounts	Total
972 lb.			
Swivel Steel,			
Clevis "	516 "		
" "	290 "		
Swivel Eye Steel	329 "		
Choker Hook steel,	3135 "		
Block "	233 "		
" "	798 "		
Line "	691 "		
(ends painted white)			
Block Side Steel,	650 "		
Sledge Steel,	1165 "		
Piston Rod Steel	320 "		
(ends painted white)			
Piston Rod, painted white	742 "		
" "	471 "		
Valve Rod Steel,	107 "		
(ends painted white)			
Locomotive Spring steel	1112 "		
Dog Hook Steel,	3605 "		
Cold Chisel "	21 "		
" "	74 "		
Track "	612 "		
" "	402 "		
" "	287 "		
" "	235 "		
Splitting Wedge steel,	730 "		
F. & B. Wedge Steel,	2300 "		
Cold Shut Steel,	562 "		
" "	870 "		
" "	1110 "		
" "	1140 "		
(ends painted red)			



Our Number	Your Quantity	Size	Description	Weight	Price	Amounts	Total
2012 Req. # W-653	50 Bars	¾" Rd.	Cold Shut Steel,	1620 lb.			
	2 "	1" "	Roller Bearing Steel, (ends painted white)	123 "			
	250 Ft.	1 ¼"x6"	Draw Head Steel,	5985 "			
	8 "	3" Sq.	Bars cut in two, Die Steel, Ann. ....	30207 "	12 ½¢	3775 88	
	8 "	4" "	(ends painted white) Die Steel, Ann.	237 "			
				446 "			
				703 "	17 ¢	119 51	
							\$3895 39

[Endorsed]: No. 1507. United States District Court, Western District of Washington, Neumeyer & Dimond vs. Polson Logging Co. Defendants' Exhibit F.  
No. 2584. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit F. Received and filed Mch. 18, 1915. F. D. Monckton, Clerk.

## [Defendants' Exhibit "G"—Summary.]

## SUMMARY.

Size	Grade	Length Ordered.	Length Shipped	Diff.	Sur. Wgt. Shipped.	Short Wgt. Shipped.
1½ x 2½	Swivel Steel	60'	77' 2¼"	17' 2¼"	202 #	
2" Rd.	Clevis Steel	40'	48' 4½"	8' 4½"	89 #	
1¾ Rd.	do.	40'	57' 0½"	17' 0½"	87 #	
2¼ Rd.	Swivel Eye Steel	20'	24' 5½"	4' 5½"	60 #	
1¼ x 4½	Choker Hook "	20'	25' 5¾"	3' 5¾"	106 #	*2642 #
1¼ Rd.	Block " "	40'	53' 11½"	13' 11½"	60 #	
2½ Rd.	do.	40'	47' 2¼"	7' 2¼"	120 #	
2¼ Rd.	do.	40'	51' 3 "	11' 3 "	151 #	
5/16 x 14	Block Side Steel	40'	43' 4¾"	3' 4¾"	51 #	
2¾ Rd.	Sledge Steel.	40'	44' 6½"	4' 6½"	117 #	
2" Rd.	Piston Rod Steel	40'	29' 6½"	10' 5½"		114 #
2½ Rd.	" " "	40'	44' 8¾"	4' 8¾"	76 #	
1 13/16 Rd.	" " "	40'	53' 5½"	13' 5½"	119 #	
1¼ Rd.	Valve Rod Steel	20'	23' 1 "	3' 1 "	13 #	
7/16 x 3½	Loco Spring "	20'	22' 0¼"	2' 0¼"	10 #	
1 x 2	Dog Hook Steel	500'	532' 10 "	32' 10 "	222 #	
5/8 Oct.	Chisel Steel	20'	9' 4½"	10' 7½"		44 #
¾	" "	40'	47' 4½"	7' 4½"	11 #	
2" Sq.	Track Chisel St.	40'	44' 3½"	4' 3½"	59 #	
1½ Sq.	" " "	40'	51' 9¾"	11' 9¾"	91 #	
1¾ Sq.	" " "	40'	44' 1 "	4' 1 "	28 #	
1¼ Sq.	" " "	40'	42' 10 "	2' 10 "	16 #	
3"	Sledge Steel	20'	23' 8 "	3' 8 "	107 #	
1 x 3	" "	240	231' 2¾"	8' 9¼"		87 #
7/8 Rd.	Cold Shut Steel	240'	268' 10½"	28' 10½"	57 #	
1" "	" "	240'	293' 11¾"	53' 11¾"	158 #	
1½ "	" " "	240'	328' 1½"	88' 1½"	288 #	
1¼ x 6	Draw Head Steel	250'	236' 1 "	13' 11 "		354 #
1¼	Cold Shut Steel	240'	275' 11 "	35' 11 "	175 #	
1"	Roller Bearing	40'	39' 1 "	11 "		4 #
¾	Cold Shut Steel	1000'	1078' 3¾"	78' 3¾"	117 #	
17/8 Oct.	Steel		11' 10 "		119 #	
					2709 #	
						3245 #

[Endorsed]: No. 1507. United States District Court, Western District of Washington. Neumeyer & Dimond vs. Polson Logging Co. Defendants' Exhibit G.

No. 2584. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit G. Received and filed Mch. 18, 1915. F. D. Monckton, Clerk.

**[Defendants' Exhibit "H"—Account-Book.]**

[Endorsed]: No. 1507. United States District Court, Western District of Washington. Neumeyer & Dimond vs. Polson Logging Co. Defendants' Exhibit "H."

No. 2584. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit "H." Received and filed Mch. 18, 1915. F. D. Monckton, Clerk.

$$\frac{11}{4} \times 6$$

$$11\frac{1}{2} \times 21\frac{1}{2}$$

1	13'	2"
2	12	7 $\frac{1}{2}$
3	13'	1 $\frac{1}{2}$
4	13'	1
5	13'	1
6	12'	3

 $11\frac{1}{4} \times 41\frac{1}{2}$   
 1 12' 11'

2" 0

2 12' 7'

1	7'	6'
2	7	51 $\frac{1}{2}$
3	7'	61 $\frac{1}{4}$
4	7'	5
5	12	21 $\frac{1}{2}$
6	12'	21 $\frac{1}{2}$
7	11'	81 $\frac{1}{2}$
8	12'	21 $\frac{1}{2}$

11 $\frac{1}{4}$	0
1 11'	5
2 11	61 $\frac{1}{4}$
3 11	21 $\frac{1}{4}$
4 11'	6
5 11'	4'
6 11'	3"

11 $\frac{1}{4}$	4
11	11"
12	11
13	11
14	12'
15	11"
16	11"
17	11'
18	11
19	1
20	11

11 $\frac{1}{4}$	0
21 11	2
22 11	51 $\frac{1}{2}$
23 11	61 $\frac{1}{2}$
24 11	31 $\frac{1}{2}$
25 11	8
26 11	6
27 13	53 $\frac{3}{4}$
28 13	63 $\frac{3}{4}$
29 14'	11 $\frac{1}{4}$
30 14	6

13 $\frac{3}{8}$  0

1	14'	43 $\frac{3}{4}$
2	14	13 $\frac{3}{4}$
3	14	11 $\frac{1}{2}$
4	14'	4'

8 11	61 $\frac{1}{4}$
9 11'	2'
10 13'	2

17	11'	5
18	11	6
19	1	21 $\frac{1}{2}$
20	11	61 $\frac{1}{4}$

21 $\frac{1}{2}$  0

5/14 x 14 Nason

21 $\frac{1}{4}$  0

1	12'	3
2	12	111 $\frac{1}{4}$
3	13	3 $\frac{3}{4}$
4	12	11
5	12'	3'
6	12	21 $\frac{1}{2}$

1 12'	81 $\frac{1}{2}$
2 11	51 $\frac{1}{2}$
3 10'	6
4 11'	1"
5 11	83 $\frac{3}{4}$
6 11	41 $\frac{1}{2}$
7 11	81 $\frac{1}{2}$
8 11	31 $\frac{1}{4}$

1 10'	1"
2 11'	11 $\frac{1}{2}$
3 11	2
4 11	11 $\frac{1}{2}$



$$2\frac{3}{4} \square$$

1	11	2'
2	11	2
3	11'	
4	11'	2

---

1	13	3 $\frac{3}{4}$
2	13	4 $\frac{3}{4}$
3	13'	2 $\frac{1}{4}$
4	13'	5

---

1	11	1 $\frac{1}{2}$
2	10	11 $\frac{1}{2}$

---

1	x	2
1	10	7
2	10	9
3	10	8 $\frac{1}{4}$
4	10	9 $\frac{1}{2}$
5	10	7 $\frac{1}{2}$
6	10	8 $\frac{1}{2}$
7	10	8 $\frac{3}{4}$
8	10	8 $\frac{3}{4}$
9	10	8 $\frac{1}{4}$
10	10	8 $\frac{1}{2}$

---

1	x	2
11	10	6 $\frac{1}{2}$
12	10	8 $\frac{1}{4}$
13	10	7 $\frac{3}{4}$
14	10	7
15	10	11
16	10	9 $\frac{1}{4}$
17	10	8
18	10	8 $\frac{1}{2}$
19	10	7
20	10	5

---

1	x	2
21	10	10 $\frac{1}{2}$
22	10	8
23	10	7 $\frac{3}{4}$
24	10	8 $\frac{1}{4}$
25	10	8
26	10	7 $\frac{1}{2}$
27	10	7 $\frac{1}{2}$
28	10	6 $\frac{3}{4}$
29	10	7 $\frac{1}{4}$
30	10	6 $\frac{1}{4}$

1 x 2

31 10 8 $\frac{1}{4}$ 32 10 9 $\frac{1}{4}$ 33 10 6 $\frac{1}{2}$ 

34 10 8'

35 10 5

36 10 5 $\frac{3}{4}$ 37 10 9 $\frac{3}{4}$ 38 10 8 $\frac{3}{4}$ 39 10 7 $\frac{1}{2}$ 40 10 10 $\frac{1}{2}$ 

1 x 2

41 10 7

42 10 7 $\frac{1}{2}$ 43 10 10 $\frac{1}{4}$ 

44 10 6

45 10 6 $\frac{3}{4}$ 46 10 6 $\frac{1}{2}$ 47 10 10 $\frac{1}{4}$ 48 10 6 $\frac{1}{2}$ 49 10 6 $\frac{1}{2}$ 50 10 7 $\frac{1}{4}$  $\frac{5}{8}$  Oct

1 9' 5"

 $\frac{3}{4}$  Oct1 12' 2 $\frac{1}{2}$ 

2 12' 4

3 11' 5"

2' □

1 11 10 $\frac{1}{2}$ 2 10' 9 $\frac{1}{4}$ 

3 11' 1"

4 10' 6 $\frac{3}{4}$

$1\frac{1}{2}$   $\square$

1 12' 3

2 13  $\frac{3}{4}$

3 13  $11\frac{1}{2}$

4 12  $6\frac{3}{4}$

---

$1\frac{3}{8}$   $\square$

1 11 4''

1 10  $5\frac{1}{2}$

3 10  $9\frac{1}{2}$

4 11  $6\frac{1}{4}$

---

$1\frac{1}{4}$   $\square$

1 9' 2''

2 9' 8

3 12

4 12

---

3'  $\square$

1 11''  $9\frac{1}{2}$

2 11'  $9\frac{1}{2}$

3 8' 3'

---

1 x 3

1 9  $4\frac{3}{4}$ 2 9  $4\frac{1}{4}$ 3 8  $4\frac{1}{4}$ 4 9  $9\frac{1}{4}$ 

5 9' 6'

6 9  $6\frac{3}{4}$ 7 9'  $5\frac{3}{4}$ 

8 9 7

9 11  $11\frac{1}{4}$ 10 9  $5\frac{3}{4}$ 

1 x 3

11 9 4"

12 9  $4\frac{1}{2}$ 

13 9 8"

14 9  $5\frac{1}{4}$ 

15 9 6"

16 12 2

17 9  $6\frac{1}{4}$ 18 9  $6\frac{1}{2}$ 19 9  $5\frac{1}{4}$ 20 9  $5\frac{1}{4}$ 21 9  $2\frac{1}{2}$ 

22 9' 1

23 9'  $5\frac{3}{4}$ 

24 9' 5'



$\frac{7}{8}$	0	mld
1	11	$11\frac{3}{4}$
2	11	$6\frac{1}{2}$
3	11	$11\frac{1}{2}$
4	11	$4\frac{3}{4}$
5	11	$4\frac{1}{4}$
6	11	2
7	11	$2\frac{1}{4}$
8	12	$1\frac{1}{2}''$
9	11	$3\frac{1}{4}$
10	11	2
11	11	$3\frac{1}{2}$
12	12	
13	11	$1\frac{1}{2}$
14	11	$7\frac{1}{2}$
15	11	7
16	11	$9\frac{1}{2}$
17	12	
18	11	5
19	11	1
20	11	4
21	9	$7\frac{1}{2}$
22	9	$5\frac{1}{2}$
23	9	$7\frac{1}{2}$
24	9	$7\frac{3}{4}$

1' 0 mld

1 12  $10\frac{3}{4}$ 2 12  $3\frac{3}{4}$ 3 12  $11\frac{1}{2}$ 

4 12 10

5 12 2

6 12  $4\frac{3}{4}$ 7 12  $5\frac{1}{4}$ 

8 13 3

9 12  $3\frac{1}{2}$ 

10 12 4

11 12 2

12 13 1

13 11  $9\frac{1}{4}$ 14 10  $7\frac{1}{2}$ 15 12  $8\frac{1}{2}$ 16 12  $10\frac{1}{4}$ 

17 12 8

18 12  $2\frac{1}{2}$ 

19 12 3

20 12  $4\frac{1}{2}$ 21 12  $10\frac{1}{2}$ 

22 11 9

23 12 3

24 11  $9\frac{1}{4}$ 

25 12 1

26 12 4

27 12  $2\frac{3}{4}$

$1\frac{1}{8}$	0 mld
1	14
2	14
3	13 $11\frac{1}{2}$
4	13 $11\frac{1}{2}$
5	14
6	13 $10\frac{3}{4}$
7	13 $11\frac{3}{4}$
8	13 8
9	13 $11\frac{1}{2}$
10	13 $2\frac{1}{4}$
11	14
12	13 $11\frac{3}{4}$
13	14
14	13 $1\frac{3}{4}$
15	12 $11\frac{1}{4}$
16	13 $4\frac{7}{4}$
17	13 $3\frac{1}{2}$
18	13 $4\frac{3}{4}$
19	12 $10\frac{3}{4}$
20	14
21	13 $4\frac{3}{4}$
22	13 1
23	13 $11\frac{3}{4}$
24	13 $11\frac{1}{2}$

$\frac{3}{4}$  0 mld

10  $11\frac{1}{4}$

10 4

10  $4\frac{1}{2}$

10 1

8 4

9 11

9  $\frac{1}{2}$

11 10

11 9

12  $\frac{1}{2}$

10  $6\frac{1}{2}$

11 11

9 10

9 8

10 3

9  $\frac{1}{2}$

12 9

10 3

9 4

12  $\frac{1}{4}$

10 9

11 4

10 2

10  $4\frac{1}{2}$

9 2

9 5

10 1

8 2

9  $7\frac{1}{4}$

9  $8\frac{1}{2}$



$\frac{3}{4}$  0 mld.  
 7  $9\frac{1}{2}$   
 9  $4\frac{1}{4}$   
 9  $5\frac{1}{2}$   
 11  $2\frac{1}{2}$   
 10  $2\frac{1}{4}$   
 9  $11\frac{1}{4}$   
 9 6  
 11  $\frac{1}{2}$   
 9  $11\frac{1}{2}$   
 9 1  
 9 11  
 11 10  
 9  $11\frac{1}{2}$   
 12 8  
 10  $9\frac{3}{4}$   
 11 11  
 9  $6\frac{3}{4}$   
 9  $10\frac{1}{4}$   
 10 11  
 12  $8\frac{1}{2}$   
 14  $11\frac{3}{4}$   
 15  $1\frac{1}{2}$   
 12 5  
 10 3  
 15  $4\frac{3}{4}$   
 12  $8\frac{1}{2}$   
 10  $10\frac{1}{2}$   
 11  $3\frac{1}{2}$   
 10  $1\frac{1}{2}$

$\frac{3}{4}$ 0 mld.	$\frac{3}{4}$ 0 mld.
9 $10\frac{1}{4}$	12' 1
11 7	9 $5\frac{3}{4}$
11 10	10 $5\frac{1}{2}$
10 2	12 3
10 $4\frac{1}{2}$	10 $9\frac{1}{2}$
10 $3\frac{1}{2}$	9 $6\frac{1}{2}$
11 7	10 $11\frac{1}{2}$
10 $10\frac{1}{2}$	13 2
10 4	14 8
10 $3\frac{1}{2}$	11 2
14 $3\frac{3}{4}$	14 8
9 11	<hr/>
9 7	$17\frac{7}{8}$ October
10 $11\frac{1}{2}$	11 10
11 2	
14 9	
12 5	
10 $9\frac{1}{4}$	
10 $5\frac{1}{2}$	
10 $5\frac{1}{4}$	
9 9	
12 $9\frac{1}{4}$	
8 $5\frac{1}{2}$	
8 $7\frac{1}{2}$	
11 $2\frac{1}{4}$	
9 $4\frac{1}{2}$	
9 $10\frac{1}{2}$	
9 7	
9 11	
8 3	

$1\frac{1}{4} \times 6$  tank

1	9	9
2	9	$6\frac{1}{2}$
3	9	5
4	9	8
5	9	7
6	9	$7\frac{1}{2}$
7	9	10
8	9	3
9	9	$3\frac{1}{2}$
10	9	2
11	9	6
12	9	$10\frac{3}{4}$
13	9	$\frac{1}{2}$
14	9	$3\frac{1}{4}$
15	9	$3\frac{1}{2}$
16	9	$6\frac{1}{2}$
17	9	$3\frac{1}{2}$
18	9	$3\frac{1}{4}$
19	9	7
20	9	$8\frac{1}{2}$
21	9	$11\frac{1}{2}$
22	9	7
23	9	$4\frac{1}{2}$
24	9	$5\frac{1}{2}$
25	9	$3\frac{1}{2}$

4' ☐1 8  $1\frac{1}{2}$ 

GEO. J. MILL

4802 So M Street

Tacoma

377 bars

$2\frac{3}{4}$	<input type="checkbox"/>	2'	<input type="checkbox"/>	3'	<input type="checkbox"/>
1	11' 2"	#1	11' 10 $\frac{1}{2}$	#1	11' 9 $\frac{1}{2}$
2	11' 2"	2	10 9 $\frac{1}{4}$	#2	11' 9 $\frac{1}{2}$
3	11'			#3	8' 3
4	11' 2"				
	$11\frac{1}{4} \times 4\frac{1}{2}$				
1	12' 11"			4'	<input type="checkbox"/>
2	12' 7"			#1	8' 11 $\frac{1}{2}$

 $11\frac{1}{4} \times 6$ 

25 Bas

1	9' 9	#11	9' 6'	21	9' 11 $\frac{1}{2}$
2	9' 6 $\frac{1}{2}$	12	9' 10 $\frac{3}{4}$	24	9' 7
3	9' 5"	13	9' 1 $\frac{1}{2}$ "	23	9' 4 $\frac{1}{2}$
4	9' 8"	14	9' 3 $\frac{1}{4}$	24	9' 5 $\frac{1}{2}$
5	9' 7	15	9' 3 $\frac{1}{2}$	25	9' 3 $\frac{1}{2}$
6	9' 7 $\frac{1}{2}$	16	9' 6 $\frac{1}{2}$		
7	9' 10	17	9 3 $\frac{1}{2}$		
8	9' 3	18	9 3 $\frac{1}{4}$		
9	9 3 $\frac{1}{2}$	19	9 7		
10	9' 2	20	9 8 $\frac{1}{2}$		

Unusual Rld

$5/16 \times 14$	1	10'	1"
	#2	11	11 $\frac{1}{2}$
	3	11'	2
	4	11	11 $\frac{1}{2}$



[**Defendants' Exhibit "I"—Letter.**]

Polson Logging Company,  
Hoquiam, Wash.

Gentlemen:

Enclosed please find copy of letter received to-day  
from the Northern Pacific Railway Company.

Respectfully yours,  
NEUMEYER & DIMOND.  
A. J. DIMOND.

AJD/GS

Enclosure (1)

COPY.

Tacoma, Wash., May 10, 1913.

In your reply please quote.  
File No. L—6059 Desk 7.

Neumeyer & Dimond,  
New York City.

Gentlemen:

I have a copy of your invoice dated February 6th,  
1913, covering shipment of one car of steel, con-  
signed to Polson Logging Company, Hoquiam,  
Wash.

This shipment arrived at Hoquiam on March 11th,  
and same was refused by consignee account they  
claim not ordered. Shipment has now been un-  
loaded from car to release shipment, and is now on  
hand at Hoquiam in storage, and any further  
charges which accrue, *with*er from storage or dam-  
age, will be charged against this shipment.

Would be pleased to have you furnish us with disposition at the earliest possible date.

Yours truly,

J. M. MOONEY,

A. F. C. A.

[Endorsed]: No. 1507. United States District Court, Western District of Washington. Neumeyer & Dimond vs. Polson Logging Co. Defendants' Exhibit "I."

No. 2584. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit "I." Received and filed Meh. 18, 1915. F. D. Monckton, Clerk.

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[Defendants' Exhibit "J"—Letter (Copy).]

COPY.

June 6, 1913.

Messrs. Neumeyer & Dimond,

82 Beaver Street,

New York, N. Y.

Gentlemen:

Your favor of June 2nd to hand, and in reply will say that our Mr. Shaw never had authority from our concern to buy a carload of steel from anyone, much less from your concern; and besides, according to your own bill there are a great many sizes of steel in it that have never been used, and cannot be used by our Company, which should make it clear to any reasonable firm that the order in question was never placed by our firm.

Very truly yours,

POLSON LOGGING COMPANY,

By \_\_\_\_\_,

AP—A.

President.

[Endorsed]: No. 1507. United States District Court, Western District of Washington. Neumeyer & Dimond vs. Polson Logging Co. Defendants' Exhibit "J."

No. 2584. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit "J." Received and filed Mch. 18, 1915. F. D. Monckton, Clerk.





United States  
Circuit Court of Appeals

For the Ninth Circuit.

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POLSON LOGGING COMPANY, a Corporation,  
Plaintiff in Error,  
vs.

GUSTAVE H. NEUMEYER and ABRHAM J.  
DIMOND, Copartners Doing Business Under  
the Name and Style of NEUMEYER &  
DIMOND,  
Defendants in Error.

---

Brief of Plaintiff in Error.

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FILED

---

MAY 3 - 1915

Bridges & Bruener,  
Attorneys for Plaintiff in Error.

F. D. Monckton,

Postoffice Address: Aberdeen, Wash.

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

---

POLSON LOGGING COMPANY, a Corporation,  
Plaintiff in Error,

vs.

GUSTAVE H. NEUMEYER and ABRHAM J.  
DIMOND, Copartners Doing Business Under  
the Name and Style of NEUMEYER &  
DIMOND,

Defendants in Error.

---

Brief of Plaintiff in Error.

---

STATEMENT OF THE CASE.

Neumeyer & Dimond, co-partners, brought this action against Polson Logging Company, a corporation, to recover the sum of \$3,895.39, alleged to be due them on a written order for goods, wares and merchandise, a copy of said order being attached to the complaint as Exhibit "A". (R. p. 3). Exhibit "A" is an order for a large amount of steel of dif-

ferent sizes and dimensions, and defendants in error alleged in Paragraph 4 of the complaint, that they delivered to plaintiff in error the goods, wares and merchandise called for by, and in accordance with said order, at Hoquiam, Washington. (R. p. 4).

The answer is a general denial and also sets up an affirmative defense of fraud in the procurement of said order, and lack of authority on the part of J. C. Shaw to sign said order on behalf of plaintiff in error. (R. p. 6). The reply is a general denial of the affirmative defense set up in the answer. (R. p. 10).

The cause was duly tried before a jury, on the 24th, 25th and 26th days of September, 1914. At the close of the testimony of defendants in error, plaintiff in error challenged the sufficiency thereof, which motion was denied and exception duly taken and allowed. (R. p. 28). At the close of all the testimony in the case, plaintiff in error moved the court to instruct the jury to bring in a verdict for the plaintiff in error, upon the ground that defendants in error had not proved that they delivered to the said plaintiff in error, goods, wares and merchandise of the kind, character and description called for by the contract sued on, and in accordance with said contract. This motion was also denied and exception duly taken and allowed. (R. p. 70). The court thereupon instructed the jury, and the jury later returned a verdict against the plaintiff in error in the amount sued for, plus interest, and judgment was thereafter



and to-wit: on the 9th day of October, 1914, entered in favor of defendants in error. (R. p. 11).

On the 30th day of September, 1914, plaintiff in error duly filed and served a motion for judgment notwithstanding the verdict, and thereafter and in due course, plaintiff in error filed and served a motion for a new trial. (R. p. 13). On the 24th day of November, 1914, and in term time, the District Court, on the application of plaintiff in error, did, for good cause shown, extend the time to December 20th, 1914, for plaintiff in error to draw up, serve and file its bill of exceptions. (R. p. 15).

On the 30th day of November, 1914, plaintiff in error's motions for a new trial and for judgment notwithstanding the verdict were duly presented to the court and argued, which motions were by the court overruled and exceptions duly taken and allowed. (R. p. 15).

Plaintiff in error's proposed bill of exceptions was duly certified by the court on the 19th day of December, 1914, and thereafter a writ of error was duly prosecuted to this court. (R. p. 92, 94).

For the purpose of facilitating and abbreviating the record on appeal herein, it was stipulated between the parties that plaintiff in error, in the prosecution of its appeal to this court, would admit that there was sufficient testimony to go to the jury, and that the jury was justified in finding that the the order sued on in the action was obtained from

plaintiff in error in good faith, and that J. C. Shaw, who signed the order on behalf of the Polson Logging Company, had authority to sign said order, and that the claim or defense of fraud alleged by the said plaintiff in error in its affirmative defense, was not proven, and that the plaintiff in error would not urge on the appeal of this cause, any exception or objection to the sufficiency of the evidence or the verdict of the jury on the points mentioned.

## **ASSIGNMENTS OF ERROR.**

### **I.**

The District Court of the United States for the Western District of Washington, Southern Division, erred in overruling and refusing to grant defendant's motion for a non-suit, at the close of the plaintiffs' testimony, and in refusing to instruct the jury to bring in a verdict for the said defendant, after defendant had challenged the sufficiency of plaintiffs' testimony at the close thereof. Said motion should have been granted for the reason that the plaintiffs failed to prove that they delivered or tendered delivery to the said defendant, bars of steel of the kind character and description called for by the contract and in accordance therewith.

### **II.**

That the court erred in overruling the defendant's motion for a directed verdict, at the close of all the testimony, for the reason that the evidence in the case conclusively shows that the plaintiffs did

not deliver or tender delivery to the defendant, personal property of the kind, character and description called for by the contract sued on and in accordance with said contract.

### III.

That the court erred in refusing to give to the jury Instruction No. 3, duly requested by said defendant on the trial of said cause, which instruction reads as follows:

#### **“INSTRUCTION NO. 3.**

If you find that the defendant ordered the goods, wares and merchandise sued on and gave the order as contended for by the plaintiffs, and said order was not procured through fraud, as alleged by the defendant, and you find that the person who signed said order on behalf of the defendant company, to-wit: J. C. Shaw, had authority or apparent authority as will hereafter be explained, to order said goods on behalf of the defendant company, and if you find further that the plaintiffs delivered or tendered a delivery of the steel called for by the contract, to the defendant at Hoquiam, Washington, and the defendant wrongfully refused payment therefor, then you will find for the plaintiffs for the amount agreed to be paid for said goods, as provided for in said order, with interest. In determining the fact, whether or not the plaintiffs have complied with their contract in delivering or tendering delivery to the defendant of the steel ordered, if you find it was ordered, I instruct you that to constitute a good delivery in law, so as to make the defendant liable for said steel, the same must correspond in quantity and in kind and description with that named in the

order. The defendant was not obliged to accept any less or any greater number of bars of steel than ordered, nor was the defendant obliged to accept bars of steel of any less or greater length than ordered, and if the steel, or any part thereof, delivered or tendered to the said defendant, did not comply with the contract in this, to-wit: that said bars of steel were less or greater in number than shown on the order sued on, or said bars of steel, or some thereof, were not of the length specified in the order, but were of a greater or less length, then the defendant had a right to reject the whole of said order so delivered or tendered, because the failure of the seller, the plaintiffs in this case, to deliver the quantity specified, or to deliver steel of the length specified, constituted a total breach of the contract. The plaintiffs in this case were bound to tender or deliver the number of bars of steel called for, and were bound to tender bars of steel of the length called for, and if you find that the plaintiffs did not deliver or tender delivery of the number of bars of steel specified in the order, or the bars delivered or tendered were of a greater or less length than twenty feet cut in two, then you will find your verdict for the defendant."

#### IV.

That the court erred in refusing to give to the jury Instruction No. 6, duly requested by said defendant on the trial of said cause, which instruction reads as follows:

#### **"INSTRUCTION NO. 6.**

If you find that the defendant ordered the goods, wares and merchandise sued on and gave the order as contended for by the plaintiffs, and



said order was not procured through fraud, as alleged by the defendant, and you find that the person who signed said order on behalf of the defendant company, to-wit: J. C. Shaw, had authority or apparent authority, as will hereafter be explained, to order said goods on behalf of the defendant company, and if you find further that the plaintiff delivered or tendered a delivery of the steel called for by the contract, to the defendant at Hoquiam, Washington, and the defendant wrongfully refused payment therefor, then you will find for the plaintiffs for the amount agreed to be paid for said goods, as provided for in said order, with interest. In determining the fact, whether or not the plaintiffs have complied with their contract in delivering or tendering delivery to the defendant of the steel ordered, if you find it was ordered, I instruct you that to constitute a good delivery in law, so as to pass the title to the steel to the defendant and to make the defendant liable for said steel, the same must strictly correspond in quantity and in kind and description with that named in the order. The defendant was not obliged to accept any less or any greater number of bars of steel than ordered, nor was the defendant obliged to accept bars of steel of any less or greater length than ordered, and if the steel delivered or tendered to the said defendant, did not comply with the contract in this: that said bars of steel were less or greater in number than shown on the order sued on, or said bars of steel were not of the length specified in the order, but were of a greater or less length, then the defendant had a right to reject the whole of said order so delivered or tendered, because the failure of the seller, the plaintiffs in this case, to deliver the quantity specified, or to deliver steel of the length specified, constituted a total breach of the contract. The plaintiffs in this case were bound to tender or deliver the exact quantity of bars of

steel called for—neither more nor less—and were bound to tender bars of steel of the length called for—neither more nor less—and if you find that the plaintiffs did not deliver or tender delivery of the exact number of bars of steel specified in the order, or the bars delivered or tendered were of a greater or less length than twenty feet cut in two, then you will find your verdict for the defendant.”

## V.

That the court erred in denying defendant's motion for judgment notwithstanding the verdict.

## VI.

That the court erred in denying defendant's motion for a new trial, for the reason that Instructions Nos. 3 and 6 should have been given by the court to the jury, and because the testimony of the plaintiffs with reference to the completion of the contract on their part, was not sufficient to justify the verdict and the judgment.

## ARGUMENT.

### I.

THE COURT ERRED IN REFUSING TO DIRECT THE JURY TO RETURN A VERDICT IN FAVOR OF PLAINTIFF IN ERROR, AT THE CLOSE OF ALL THE TESTIMONY IN THE CASE, AND IN ENTERING JUDGMENT IN FAVOR OF DEFENDANTS IN ERROR.

It is elementary that the seller in an action for the price of goods sold, must prove a performance on his part, of the contract sued on.

In this case defendants in error's action is based on an executed contract, and it was necessary, therefore, to allege in the complaint, and to prove, by a preponderance of the evidence, that they delivered or tendered a delivery to plaintiff in error of goods of the kind, character and description specified in the contract.

In 35 CYC, page 564, the rule is laid down as follows:

“The burden of proof is upon the plaintiff to prove the contract, terms thereof, the performance of the contract on his part, or a waiver of its provisions by the buyer, and also that the goods delivered or tendered complied with the contract.”

In *McCall & Co. v. Jacobson*, 139 Mich., 455; 102 N. W. p. 969, the court said:

“It was an essential part of plaintiff's case to prove that the goods tendered complied with the contract.”

In *Price et al v. Wiesner*, (Kan. 1910), 111 Pac., p. 438, the court sustained a demurrer to the complaint, and said:

“If the instrument had constituted a binding contract, the plaintiffs, in order to recover, would have been obliged to offer some proof to show that the goods were delivered in accordance with the contract. There was no offer of any evidence, except the alleged contract itself. Until delivery the seller can maintain no action for the purchase price, except in those cases where the contract contemplates that he shall retain possession.”

See also:

Bray Clothing Co. v. McKinney (Ark. 1909),  
118 S. W., p. 406.

24 A. & E. Enc. of Law, p. 1062.

Tiedeman on Sales, Sec. 68.

2 Mechem on Sales, 746.

J. B. Inderrieden Co. v. Johnson Co. (Minn.  
1910), 128 N. W., 570.

35 Cyc., 531-550.

Pontiac Shoe Co. v. Hamilton, 44 S. W. 405.

The order in this case specifies that the bars of steel, with the exception of the last item on the order, should be twenty feet long, cut in two. (R. p. 115). In other words, each bar of steel should be twenty feet long, cut in two, thus making two bars of 10 feet each. There can be no dispute as to the construction of this order.

Mr. Sulcove, the agent who obtained the order, testified that he obtained the information with reference to the number of bars, the sizes and lengths thereof, etc., from the camp. He testified:

“Q. All of those bars were to be 20 feet long, cut in two?

A. Yes, sir.

Q. And you got your specifications with reference to the length from Mr. Kline and Mr. Brown?

A. Yes, sir.



Q. The last two items on the order were to be eight feet each?

A. Yes, sir.

Q. Now, did they specify also the different kinds of steel wanted, so many bars of Swivel Steel, Choker, Clevis, Swivel Eye, Choker Hook and Piston Rod Steel?

A. Yes, I marked it exactly as they gave it to me.

Q. In fact, they specified feet, description, number of sizes, length of the bars, and the kind, whether Piston Rod or Draw Head Steel, that they wanted and that they said that the camp needed?

A. Yes, sir."

(R. p. 20).

The only person who testified on behalf of defendants in error, with reference to a delivery of the goods called for by the contract, was Mr. W. E. Neumeyer, who did not become a member of the firm until the first of the year following. He testified that at the time the order was taken by Mr. Sulcove, witness was traveling for Neumeyer & Dimond in the capacity of a salesman (R. p. 25); that the order first came to his attention when Mr. Sulcove came back to Portland, in the year 1912, and witness mailed this order, together with other orders, to the office of the firm in New York City. About a year later witness went to Hoquiam and called upon plaintiff in error,

for the purpose of adjusting the matter, but no adjustment was reached. His entire testimony with reference to the performance by his firm of this contract, is as follows:

Direct Examination.

“Q. Did you see this steel when you were down there?

(Referring to the time when witness was in Hoquiam a year after the order was taken).

A. Yes, I went to the Freight Depot and talked to the Freight Agent and I saw the bills of lading and I saw the steel.

Q. And that steel was shipped in accordance with this order in Court?

A. Exactly.”

(R. p. 22).

On cross-examination his entire testimony on this point is as follows:

“Q. Now the only time you saw this steel was at Hoquiam, Mr. Neumeyer?

A. At Hoquiam, when I wanted to be sure that the steel was altogether, and besides I wanted to talk to the Freight Agent—

Q. Just answer the question. The only time you saw the steel was in the warehouse and freight depot combined, at Hoquiam?

A. Yes, sir.

Q. It was there in the corner of the warehouse all piled up?

A. Yes, sir.

Q. You did not make any examination of the steel in any way; just looked at it and saw it was still there and Neumeyer & Dimond steel and that is all you concerned yourself about?

A. Yes, sir.

Q. Your name is William E. Neumeyer?

A. Yes, sir.

Q. Are you a member of the firm of Gustave H. Neumeyer & Abraham J. Dimond?

A. Yes, since 1913, I am a member of that firm.

Q. You were not a member of that firm when this order was given?

A. Not yet.

Q. Were you connected with this business at that time or not?

A. No, sir, I was traveling just the same as Mr. Sulcove was.

Q. You were traveling in the capacity of salesman?

A. Yes.

Q. And you continued to travel in the capacity of salesman until January 1, 1913; is that correct?

A. I became a partner of the firm, but I am still traveling for the firm, just the same as I did before.

Q. So you have nothing to do with the office end of it?

A. Not much.

Q. And your orders are sent in just the same as everybody else's orders are sent in?

A. Yes, sir.

Q. And you have nothing to do with the filling or shipping of orders?

A. No, sir."

(R. p. 24, 25).

Witness also testified that this steel was manufactured by Henry Diston & Sons at Tacony, Pennsylvania, and was shipped from that point to plaintiff in error at Hoquiam. (R. p. 24).

It is well to note here, that the order is dated September 11th, 1912, and the same arrived in Hoquiam about the middle of March, 1913. It is very evident, therefore, that when Mr. Neumeyer testified that the steel had been shipped exactly in accordance with the order, he was testifying, not from personal knowledge, but merely presumed that his firm had filled the order as given. A year later he saw



a pile of steel in the Northern Pacific Warehouse at Hoquiam, but he made no examination of the same to find out what was shipped, but merely, as he expressed it, saw a pile of steel in one corner of the warehouse. (R. p. 24).

If the bills of lading and the invoice will be examined (See Exhibits A, F, 11, 12; R. p. 131, 166, 125, 127) it will be noted that the bills of lading, and the invoice, only show the number of bars shipped and the weights, but are silent as to the length of the bars.

It was upon this testimony that plaintiff in error challenged the sufficiency of the evidence, at the close of the testimony of defendants in error. If this testimony was sufficient to make a **prima facie** case in favor of defendants in error, we believe that the same was overcome by the specific testimony of the witnesses for plaintiff in error, which testimony is not disputed or contradicted in any way, shape or manner.

Mr. Flurshuts, an experienced iron and steel man connected with Foster & Co. of Hoquiam, called as a witness by plaintiff in error, testified that about a week or ten days before the trial, he examined the Neumeyer & Dimond steel in the Hoquiam warehouse, and measured and weighed each bar. (R. p. 31). As Mr. Flurshuts measured and weighed each bar, he jotted the same down, and the result of his labors is shown in plaintiff in error's Exhibit "C". (R. p. 132). Later, Mr. Mills, an experienced iron

and steel man connected with Hunt & Mottet of Tacoma (R. p. 58) and Mr. Flurshuts together measured each bar of steel, and their joint work confirmed the earlier work of Mr. Flurshuts, and their measurements were offered and admitted in evidence as plaintiff in error's Exhibits "D" and "H". (R. p. 42, 60, 150-169). By examining these exhibits, it will be noticed that the length of the bars shipped by defendants in error, do not even substantially comply with the terms of the order.

Another witness, Mr. Gillespie, using the data secured by Mr. Flurshuts and Mr. Mills, made a summary, showing the number of feet of each kind of steel ordered, the number of feet of each kind of steel actually shipped, the difference between the length ordered and shipped, and the surplus weight of such difference in length determined from the defendants in error's own weights (R. p. 53). This summary or computation was offered and admitted in evidence as plaintiff in error's Exhibit "G". (R. p. 168). We invite a careful examination of this summary.

If any explanation of the summary is necessary, we beg to refer to the first item thereof as noted, "1½x2½ Swivel Steel," which is the first item of the order sued on. Three bars of this steel were ordered, which at 20 feet long, makes 60 feet of this kind of steel ordered. There actually was shipped by defendants in error, the required number of bars, but of a total length of 77 feet 2¼ inches, making an excess length of 17 feet 2¼ inches. Now referring

to the invoice sent by defendants in error to plaintiff in error (R. p. 166), it will be noted that the total number of bars of the  $1\frac{1}{2} \times 2\frac{1}{2}$  Swivel Steel shipped, having a length, as shown above, of 77 feet  $2\frac{1}{4}$  inches, had a certain weight. By simple method of computation, therefore, it is determined that the excess length of 17 feet  $2\frac{1}{4}$  inches, had a weight of 202 pounds, which is the surplus weight shipped. By referring to the work of Mr. Flurshuts and Mr. Mills, offered in evidence as plaintiff in error's Exhibits "C", "D" and "H", the exact length of each of the six bars of  $1\frac{1}{2} \times 2\frac{1}{2}$  (or three bars cut in two) Swivel Steel, will be ascertained, and it will be shown that each of said bars was necessarily more than 10 feet long, in order to make up the difference of 17 feet  $2\frac{1}{4}$  inches. The summary, being Exhibit "G", takes up each item of the order sued on, and as the same speaks for itself, it will not be necessary to further refer to the same, except as to the general result. According to the summary, it will be noted that none of the bars comply in matter of length, with the terms of the order. Altogether, defendants in error shipped 523 feet of steel more than was ordered, or a total weight of 2,709 pounds, which at  $12\frac{1}{2}$  cents a pound, makes \$338.62. This amount represents an amount of steel shipped in excess of that ordered, and for which judgment has been entered against the plaintiff in error. On five different specifications the length shipped was less than the amount ordered, making a total short weight of 603 pounds. This is also shown on the summary, but we have left out the

2,642 pounds shown as short weight shipped, and which represents the twelve bars of steel which were shipped from Seattle at a later shipment. (R. p. 67, 127).

It developed on the trial, that there were two different shipments of steel, and we will concede, for the sake of the argument, that defendants in error have actually shipped the number of bars ordered, and will confine our argument entirely to the difference in the length of the bars and in the surplus weight.

It was upon this testimony that plaintiff in error at the close of all the testimony in the case, moved the court to direct the jury to render a verdict in its favor, upon the ground that the evidence conclusively showed that defendants in error had not complied with their contract. (R. p. 70).

In this connection two points present themselves for discussion: First. Should the court have granted the motion instructing the jury to find a verdict in favor of plaintiff in error? Second. Have defendants in error complied with their contract?

The second point is so connected with the first point, that in the discussion of the first point it will be assumed that if the testimony of plaintiff in error, on the question of the performance of the contract, must be taken as the testimony in the case, then defendants in error have not complied with their contract. Having this in mind, we refer to the rule



which should govern the action of the trial court in allowing or refusing the motion to direct the jury to give a verdict one way or another.

It is thus stated in *Commissioners v. Clark*, 94 U. S., p. 278-284:

“Decided cases may be found where it is held that if there is a scintilla of evidence in support of a case the judge is bound to leave it to the jury; but the more modern decisions have established a more reasonable rule; to-wit: that before the cause is left to the jury, there is or may be in every case, a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.”

*Ozanne v. Ill. Central R. Co.*, 151 Fed. 900-903.

*Boudrot v. Cochrane Chemical Co.*, 110 Fed. 919-922.

*Strauss v. American Chewing Gum Co.*, 114 S. W. 73-74.

*Gipe v. Pittsburgh R. Co.*, 82 N. E. 471-474.

*Coughran v. Bigelow*, 164 U. S. 301; 41 Law Ed. 443-446.

*Patton v. Tex. & P. R. Co.*, 179 U. S. 659-661; 45 Law Ed. 361-363.

*Long v. McCabe & Hamilton*, 52 Wash., 422-432.

In *Coughran v. Bigelow*, *supra*, the Supreme Court of the United States used the following language:

“The foundation for those rulings was not in the constitutional right of the trial by jury, for it has long been the doctrine of this court, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the **onus** of proof is imposed, and that, if the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly, and if the jury disregards such instructions, to set aside the the verdict.”

The Supreme Court of the State of Washington, in the case of *Long v. McCabe & Hamilton*, *supra*, said:

“Assuming, then, that the testimony was sufficient to cast this burden on appellant, the testimony adduced and offered at the trial shows that it amply sustained the charge put upon it by the trial court. Where the burden shifts, the **prima facie** showing which a plaintiff is bound to make must be measured by the evidence of the defendant rather than by any fixed rule of law.

‘When the party who has the affirmative of an issue has succeeded in making out a **prima facie** case he has relieved himself for the time being of the necessity of producing evidence; for, unless the adverse party now goes forward with evidence, this **prima facie** case naturally results in an established case upon all the evidence. In other words, this duty of introduc-

ing evidence is shifted by a **prima facie** case in the first instance, and back again by counter evidence which meets and destroys the **prima facie** case, and so on. And this is what the authorities mean when they say that the burden of proof shifts during the progress of a trial.'

5 Ency. Plead. & Prac., p. 39.

In other words, as against a motion for a judgment at the close of plaintiff's case and renewed at the close of all the evidence, a **prima facie** showing is to be determined as a matter of law by the court in the light of the explanations made by the defendant. The duty of measuring the evidence, not as to its weight but its legal effect, is put upon the court. What may have been evidence **prima facie**, may not be so when rebutted by other evidence. The negative testimony must give way to the positive evidence."

We submit, that tested by this rule, there is no evidence in the case upon which the jury could properly find a verdict for defendants in error.

The conflict in the testimony of Mr. Neumeyer, for defendants in error, and of Mr. Flurshuts, Mr. Mills and Mr. Gillespie, for plaintiff in error, is apparent rather than real. Neumeyer did not testify from personal knowledge, whereas the witnesses for plaintiff in error did. Reasonable minds could not possibly differ on the question of the length of the bars shipped by defendants in error.

As said in the case of *Weir v. Seattle Electric Co.*, 41 Wash., 657; 84 Pac., 597:

“Cases may arise in which a plaintiff's **prima facie** case is so fully explained and controverted as to leave no substantial conflict in the testimony.”

Commenting upon this case the Supreme Court of the State of Washington in the case of *Scarpelli v. Washington Water Power Co.*, 63 Wash., 18-22; 114 Pac., 870, said:

“In such cases it is the duty of the court to take the case away from the jury, either upon a challenge to the sufficiency of the testimony, or on a motion for judgment notwithstanding the verdict.”

We believe it requires no further argument to convince this court that the testimony of plaintiff in error on the question of the length of the bars actually shipped and of the surplus weight, must be taken as **the** evidence in the case. The court, therefore, should have instructed the jury to bring in a verdict for plaintiff in error.

The next proposition to discuss is, whether or not, conceding that the testimony of the plaintiff in error on this point is the undisputed testimony in the case, the defendants in error have, as a matter of law, completed their contract. In this connection the rule is laid down in 35 CYC, subject “SALES,” page 202, as follows:

“Generally a specification of quantity in a contract of sale will be regarded as material. The full quantity contracted for must be delivered at the time and place specified to constitute a suf-



ficient delivery and the buyer is in general not obliged to accept or pay for a less quantity, the failure of the seller to deliver the quantity specified constituting a total breach of the contract."

A large number of cases are cited in the notes to said quotation, some of which will be hereafter referred to.

Again on page 204 of the same volume, it is said:

"So too, a delivery in excess of the quantity contracted for is not a proper delivery and although the buyer may, if he so elects, retain the amount designated by the contract and reject the excess, no obligation is imposed on him to select the proper quantity out of the excessive quantity delivered, but he may reject the whole, especially when the selection of the proper quantity would be troublesome and laborious or the buyer did not have the privilege of separating or receiving less than the whole quantity shipped."

See cases cited in the notes to said quotation.

Again on page 206, it is said:

"If the quantity of goods sold is specified in the contract, such specification will be regarded as determinative and is not rendered indefinite because qualified by the words 'about' or 'more or less.' The use of such words merely provides for such slight variations as are necessary due to accident or to the inherent difficulty of making delivery of the exact quantity sold."

Citing cases.

It will be noted in this connection, that the specification with reference to the length of bars, does not allow or permit of any variation, no words such as

“about” or “more or less” being used. The order therefore must be read as if after each specification of the size and kind of steel, the words “Bars to be 20 feet long,” were inserted.

In the Am. & Eng. Enc. of Law, 2d Ed., Vol. 24, page 1077, subject “SALES,” the rule is laid down as follows:

“The seller is bound to tender or deliver the exact quantity called for, neither more nor less, unless the contract is separable, in which case a tender or delivery of the exact quantity called for by some severable part of the contract is **pro tanto** sufficient and must be accepted. He has not the right to send the goods sold mixed with other goods and to call upon the buyer to accept more than he bargained for or to select the quantity bargained for out of a larger quantity delivered. If the goods exceed or fall short of the quantity agreed upon, the buyer, as a general rule, may refuse the whole of them \* \* \* \* \* The quantity to be delivered is sometimes stated in the contract with the addition of such words as ‘about,’ ‘more or less,’ etc. These are considered words of estimate and expectation only and indicate a purpose on the part of the seller not to bind himself to any precise quantity, but merely to keep reasonably close to the amount named. For where the terms of the contract do not mention the exact quantity and admit of some latitude of construction, the courts are inclined to adopt a liberal construction in favor of the seller and hold a substantial compliance on his part to be sufficient.”

In passing it will be noted that the contract in question does not admit of any latitude of construc-

tion but the seller bound himself by his acceptance of the contract, to send bars 20 feet long cut in two.

In Benjamin on Sales, 4th Am. Ed., p. 800, the learned writer lays down the following rule:

“The vendor does not comply with his contract by the tender or delivery of either more or less than the exact quantity contracted for, or by sending the goods sold mixed with other goods. As a general rule, the buyer is entitled to refuse the whole of the goods tendered if they exceed the quantity agreed, and the vendor has no right to insist upon the buyer’s acceptance of all, or upon the buyer’s selecting out of a larger quantity delivered.”

The author cites and comments upon, among other cases, the case of *DIXON vs. FLETCHER*, an old English case in which the declaration alleged an order by defendant for the purchase on his account of 200 bales of cotton and a shipment to him of 206 bales, and the defendant’s refusal to receive said cotton or any part thereof. The court allowed the plaintiff to amend his declaration, holding it to be insufficient for want of averment that the plaintiffs were ready and willing to deliver the 200 bales only.

Other cases of similar import are mentioned by the author.

Again the author says in Section 690:

“If on the other hand, the delivery is of a quantity less than that sold, it may be refused by the purchaser; and if the contract be for a specified quantity to be delivered in parcels

from time to time, the purchaser may return the parcels first received if the latter deliveries be not made, for the contract is not performed by the vendor's delivery of less than the whole quantity sold."

Again in Section 691 the author says:

"The quantity to be delivered is, however, sometimes stated in the contract with the addition of words such as 'about' or 'more or less,' which shows that the quantity is not restricted to the exact number or amount specified, but that the vendor is to be allowed a certain moderate and reasonable latitude in the performance."

The author then refers to the rule laid down by the U. S. Supreme Court in the case of *Brawley vs. U. S.*, 6 Otto, 168, for the guidance of the courts in the construction of similar contracts.

"First: Where the goods are identified by reference to independent circumstances such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of 'about' or 'more or less,' or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it.

Secondly: Where no such independent circumstances are referred to and the engagement is to furnish goods to a certain amount, the



quantity specified is material and governs the contract. The addition of the qualifying words 'about', 'more or less' and the like, in such cases is only for the purpose of providing against accidental variations arising from **slight and unimportant excesses or deficiencies in number, measure or weight.**

Thirdly: In the last case, however, if the qualifying words 'about', 'more or less' and the like, are supplemented by other stipulations or conditions which give them a broader scope or more extensive significancy, then the contract is to be governed by such added stipulations or conditions."

Again, under the subject "CONDITIONS," in Section 600 of the same volume, the learned author says:

"When the vendor sells an article by a particular description, it is a condition precedent to his right of action that the thing which he offers to deliver, or has delivered, should answer the description."

The writer then goes on to say that some courts have regarded the breach on the part of the seller to comply with the specific description of an article ordered in the contract, as a breach of warranty, but that such designation was erroneous, for as he says:

"It would be better to distinguish such cases as non-compliance with the contract which a party has engaged to fulfill. \* \* \* There can be no doubt of the correctness of the distinction here pointed out. If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and if this condition be not performed, the purchaser is entitled to reject the article."

In the case of *J. A. Coats & Sons v. Huffine* (Ind.) 41 N. E., p. 465, the appellant sued to recover the price of 5,000 patent needle cards at 3 cents per card, amounting to \$150.00. The complaint was on an express contract, to which the defendant entered a general denial. It appeared that in response to a circular letter of plaintiff, enclosing a blank order, the defendant in writing ordered 5,000 patent needle cards, according to certain sizes, with his advertisement thereon, and the appellant shipped such goods on receipt of the order and mailed bill for the shipment to the defendant. The defendant, on receipt of the bill, wrote appellant, stating that someone must have made a mistake; that he intended to order, not 5,000 papers or cards, but 5,000 needles, and refused to accept the shipment, and suit was thereupon brought. After the first trial, the defendant paid the freight on the goods, took them to a private warehouse, for the sole purpose, as the jury found, of examining them to find whether the packages contained the full number of needle cards contained in the order, and it was found that the packages contained 46 cards less than 5,000. The plaintiff proved by different witnesses, that the exact number of cards ordered had been delivered to the Railroad Company.

The court said:

“It is the contention of appellee’s counsel that conceding that appellee contracted for the goods as claimed by the appellant, the contract was an entirety and that appellee was not bound

to accept a smaller or other quantity of goods than that called for by the order, and that, if appellant relies upon the contract, it must prove that it performed the whole of it by shipping to the appellee the exact quantity ordered by him."

And citing,

Smith v. Lewis, 40 Ind., 98.

Hausman v. Nye, 62 Ind., 485.

The court further found that there being conflicting testimony as to the performance of the contract, it was a question for the jury to decide, and that it was also a question for the jury to decide, whether or not the defendant had accepted the goods by paying the freight thereon and removing them to a warehouse, etc.

In the case of Brown vs. Norton, 2 N. Y. Supp., 869, the syllabus reads as follows:

"Under a contract for the sale of 10,000 Blue Welsh Fire Brick, a tender of 9,986 of such brick, of which 100 are broken, does not render the purchaser who refuses to accept, liable for the price."

In Donnor vs. Thompson, 2 Hill, 137, it was held that a contract to deliver 250 barrels, is not fulfilled by delivering 260, and the vendee may refuse the whole on account of the excess.

In the case of Norrington v. Wright, 29 Law Ed., p. 366; also found in 115 U. S., p. 188, an order was given for 5,000 tons of old "T" Iron Rails for ship-

ment from an European port or ports, at the rate of about 1,000 tons per month, beginning February, 1880, but the whole contract to be shipped before August 1st, 1880, at \$45 per ton. It appeared that the plaintiff shipped from various European ports, 400 tons by one vessel in February, 885 tons by two vessels in March, 1,571 tons by five vessels in April, 850 tons by three vessels in May, and 1,000 tons by two vessels in June, and 300 tons by one vessel in July. The February shipment was accepted and paid for, but on May 14th, about the time of the arrival of the March shipments the purchasers gave written notice that they would refuse to accept the shipments made in March and April, because not according to contract. The court said:

“In the contracts of merchants time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods or of fulfilling contracts with third persons. A statement descriptive of the subject matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.”

Citing, among other cases:

Lowber v. Bangs, 17 Law Ed., 768.

Davidson v. Von Lingen, 113 U. S., p. 40; 28 Law Ed., p. 885.



The court found that the plaintiff had not complied with his contract with reference to the time and quantity of shipment and stated the rule which had theretofore been announced by the court in the case of *Brawley v. U. S.*, 96 U. S., 168, 171, 172; 24 Law Ed., 622, 623, 624, which rule has been quoted above.

The court then said:

“The seller is bound to deliver the quantity stipulated and has no right either to compel the buyer to accept a less quantity or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly the seller's failure to ship the required quantity in the first month, gives the buyer the same right to rescind the whole contract that it would have had if it had been agreed that all the goods should have been delivered at once.”

The leading English case is probably *Bowes v. Shand*, which was finally determined by the House of Lords, and found in 2 Appeal Cases, 455, in which case contracts were made for the sale of 300 tons of Madras rice to be shipped at Madras or coast, during the months of March or April, 1874, per certain boat. It was held that the action could not be maintained because it had not been proved by the plaintiff, that the rice was put on board in March and April or in one of these two months. Lord Blackburn said:

“If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties

bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is and probably equally good rice might have been shipped in February as was shipped in March, or equally as good rice might have been shipped in May as was shipped in April. But the parties have chosen for reasons best known to themselves, to say: 'We bargain to take rice shipped in this particular region, at that particular time, on board that particular ship,' and before the defendants can be compelled to take anything in fulfillment of that contract, it must be shown, not merely that it is equally good, but that it is the same article as they have bargained for, otherwise they are not bound to take it."

In the case of *Pittsburgh Plate Glass Co. v. Kerlin Bros. Co.*, 122 Fed. 414, there was a contract for the delivery of 6 miles of first-class, second-hand 6 inch pipe, which would pass inspection, etc. The court said:

"There is nothing in the correspondence from which it could be inferred that the quantity of 6 miles was not material and determinative and when the plaintiff sold that definite quantity out of more than 9 miles, it had offered, it was bound to deliver it. If the plaintiff desired to contract only for such pipe as the defendant might select out of the quantity it had on hand at the places designated in its letter, it should have made its offer accordingly; but when it agreed to sell and deliver 6 miles upon the terms stated, it could not fulfill its obligation by delivering a less number of feet."

The rule laid down in *Brawley v. U. S.*, supra, is then quoted and the cases of *Norrington v. Wright*, supra, and *U. S. v. Pine River Logging Co.*, 89 Fed., 907, cited.

On the question of tender of a less quantity contracted for not being sufficient, see also:

*Newell v. New Holstein Canning Co.* (Wisc.)  
97 N. W., p. 486.

*Kalamazoo Corset Co. v. Simon*, 129 Fed. p  
144.

In the case of *Inman et al v. Elk Cotton Mills*, 92 S. W. p. 760, the order was for 50 bales of cotton at a specified price, but the plaintiff only tendered a delivery of 49 bales. The court said:

“A delivery of a less number was not a compliance with this contract. So far as it affected the relations of the parties, a failure in the matter of 1 bale was as much as a failure to deliver any greater number of bales. The complainants sued to recover for the breach of an entire contract and in order to maintain their bill they must show a compliance or willingness to comply with it as an entirety. Failing in this latter regard, they fail altogether.”

Citing *Tiedeman on Sales*, Sec. 101.

Furthermore, in that case the defendant had repudiated the contract but the plaintiff refused to accept the repudiation, and therefore the court said, that under the general rule, the contract was kept alive for the benefit of both parties.

On this subject the rule is laid down in 9 Cyc., p. 637:

“If a promisee elects not to accept the renunciation and continues to insist upon the performance of the promise, as he may do, the contract remains in existence for the benefit and at the risk of both parties, and if anything occurs to discharge it from other causes, the promisor may take advantage of such discharge.”  
Citing many authorities.

With reference to this latter point, see also the leading case of *Roehm v. Horst*, 178 U. S., p. 1; 44 Law Ed. p. 953.

In the case of *Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co.*, 77 S. W., p. 960, there was an order for 5 tanks of crude oil at 20 cents per gallon at 7½¢ f. o. b. the mill at Dallas, buyer's tanks, October shipment, tanks to contain about 135 barrels. It was held that the statement of 135 barrels was material, and that a delivery of 125 barrels to the tank, was not a compliance with the order.

See also *Boyd v. Second Hand Supply Co.* (Ariz.) 1912, 123 Pac. 619.

In the case of *Hills vs. Edmund Co.*, 110 Pac., 1088, there was a contract for the sale of 20 cars of fruit and only 9 were delivered. The court quoted with approval, the case of *Brawley v. U. S.*, *supra*, and also quoted from the case of *Polhemus v. Heiman*, 45 Cal., 577, where it was said:



“If the vendor delivers a less quantity of goods than he contracted to deliver, the vendee is at liberty to refuse to accept, and if he accepts a part he may return that and refuse to accept less than the whole, but having received and retained a part, he cannot refuse to pay for the part received.”

In *Barton v. Kane* (Wisc.) 84 Am. Dec., p. 728-730, the order was for 5,000 cigars and the plaintiff sent 5,625. The court held that this was not a sufficient delivery, and that:

“To constitute a delivery to the carrier, a delivery to the consignee, so as to pass the title and make the consignee liable for goods sold and delivered, the goods must correspond in quantity as well as quality, with those named in the order.”

See also *Dabovich v. Emeric*, 12 Cal., p. 180.

In the case of *Filley v. Pope*, 115 U. S., p. 213; 29 Law Ed., 372, the order was for 500 tons of No. 1 Scotch Pig Iron at \$26 per ton, shipment from Glasgow as soon as possible. The defense was that the plaintiffs failed to ship the iron from Glasgow as soon as possible. The testimony showed that the plaintiffs bought the iron from a party in Glasgow and requested him to ship it to New Orleans. The iron was then at the factory equi-distant and equally accessible by railway from the ports of Glasgow on the west coast and Leith on the east coast, and such iron was sometimes shipped from Glasgow and sometimes from Leith. No vessel could be obtained from Glasgow to New Orleans, for some consider-

able time, and the iron was shipped from the port of Leith. The lower court held that the place of shipment was not material; but the Supreme Court overruled this contention upon the strength of the case of *Norrington v. Wright*, which case was followed and quoted from with approval.

The court said, after stating the contract:

“The court has neither the means nor the right to determine why the parties in their contract specified shipment from Glasgow instead of using the more general phrase, ‘shipment from Scotland,’ or merely ‘shipment’ without naming any place; but it is bound to give effect to the terms which the parties have chosen for themselves. The term ‘shipment from Glasgow’ defines an act to be done by the sellers at the outset and a condition precedent to any liability of the buyer.”

So also in the case of *Pope v. Allis*, 29 Law Ed., p. 393. There was a contract for the sale of 500 tons of No. 1 Extra American and 300 tons of No. 1 Extra Scotch Pig Iron. Before its arrival the plaintiff had paid for the iron and also the freight, but when the iron arrived the plaintiff refused to accept the same on account of deficiency in quality, and sued the defendant for the money paid him, including freight. The defendant contended that upon breach of warranty of quality, the plaintiff cannot, in the absence of fraud, rescind the contract of purchaser and recover the price.

The court said:

“It did not appear that at the date of the contract the iron had been manufactured and it was shown by the record that no particular iron was segregated and appropriated to the contract by the plaintiffs in error, until a short time before its shipment. The defendant had no opportunity to inspect it until it arrived in Milwaukee, and consequently never accepted the particular iron appropriated to fill the contract. . . . \* \* \* \* When the subject matter of a sale is not in existence or not ascertained at the time of the contract, an undertaking that it shall when existing or ascertained, possess certain qualities, is not a mere warranty but a condition, the performance of which is precedent to any obligation upon the vendee under the contract; because the existence of those qualities being part of the description of the thing sold, becomes essential to its identity and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted.”

Citing a large number of cases. The court then quotes from the case of *Norrington v. Wright*, which is approved.

The case of *Patrick v. Norfolk Lbr. Co. et al*, a Nebraska case decided in the year 1908, and found in 115 N. W., p. 780, is squarely in point. In that case a written order for a carload of posts was given, the order calling for 7 different sizes of posts. There was a deficiency in the dimensions of the posts and in the number thereof, and it was argued that this amounted to an express warranty that the posts would be of the length and dimensions ordered. The court said:

“The record is barren of proof of an express warranty. The fact that the order was for a carload of posts of certain dimensions and that plaintiff undertook to fill that order, did not create a warranty by plaintiff that the posts would be in number and dimensions to correspond with the direction. But it was a condition precedent to defendant’s obligation to receive and pay for the posts, that their size and number equalled his order. As said by Mr. Justice O’Brien in *Carlton v. Lombard*, 149 N. Y., p. 137; 43 N. E., p. 422; and quoted with approval by Mr. Justice Bartlett in *Waeber v. Talbott*, 167 N. Y. p. 48; 60 N. E. 283; 82 Am. St. Rep. 712-717:

‘That words of description are not considered as a warranty at all; but conditions precedent to any obligation on the part of the vendee, since the existence of the qualities indicated by the descriptive words being part of the description of the things sold, become essential to its identity, and the vendee cannot be obligated to receive and pay for a thing different from that for which he contracted.  
\* \* \* The tendency of the recent decisions in this court, is to treat such words as part of the contract of sale, descriptive of the article sold and to be delivered in the future, and not as constituting that collateral obligation which sometimes accompanies a contract of sale and known as a warranty.’

We do not say defendants were under any obligation to accept the carload of posts, and as the deficiency in the number and size of the posts was not patent without unloading the car, they doubtless had the right, in the absence of an invoice demonstrating the carload was not up to their order, to take the posts from the car and count and inspect them, and upon learning



the deviation from the order, had the right to refuse to accept the posts, and in that event should promptly notify plaintiff, or they could waive the difference between what they bought and the timber sent them."

The court held, however, that the plaintiff could recover for the reason that the defendant had, after inspection of the carload, received the same, taken the posts to his yard, and for a period of 50 days sold from the quantity received.

In the case of *Wiburg et al v. Walling & Co.*, 113 S. W., p. 832, (Ken. 1908,) certain lumber was sold according to certain dimensions and subject to the following conditions imposed by the seller:

"We ship on our own inspection and measurement."

In a suit for the price, the defendants contended that the lumber shipped did not conform to the kind, description and quality specified in the contract. The court said, that—

"The defendant was not obliged to accept lumber of any other quality, kind or description than that specified in the contract; and that if the lumber delivered to them did not comply with the contract, they rejected, as they had a right to do, the whole of it, and the petition should have been dismissed. As a legal proposition it is well settled that when a person contracts for the delivery to him of goods or property of a certain quality and description, he may refuse to accept any part of the property or goods received unless all of them are in accordance with the contract. We shall also say, that in

a case like this, where lumber in carload lots was ordered and delivered, that the purchaser could not be held to have accepted it or waived his right to reject it, merely because he took it out of the cars for the purpose of inspection, as it could not be inspected without being removed from the cars and each piece of lumber examined."

Citing a large number of cases.

The court held, however, that inasmuch as the terms of sale were subject to the inspection of the seller and the seller had inspected the same and found the lumber to be of the quality and kind ordered, and no bad faith or fraud being shown, and defendant's own witnesses only claiming a deficiency to the extent of \$180, the lumber was of the kind and quality ordered.

See also the case of *Springfield Shingle Co. v. Edgecomb Mill Co.*, 52 Wash. 620; 101 Pac. 233; 35 L. R. A. (N. S.), p. 258, and extensive note to said case, particularly IV-"A" and V.

In that case, shingles were sold as Extra "A" Star Red Cedar Shingles. The court held that this description implies a contract that the shingles shall be of a quality which that brand implies. The court held that it was a condition precedent to the recovery of the price on the part of the plaintiff, to prove that he had delivered shingles of that brand and quality, and that such condition precedent should not be confounded with a warranty. The court also held that the tender of an article answering the description,

is a condition precedent to recovery, and if this condition be not performed the vendee is entitled to reject the article, or if he has paid for it, to recover back his money.

Applying the principles above announced to the case at bar, and conceding, as we must, that the testimony of plaintiff in error, on the question of length, is the uncontradicted testimony in the case, it seems to us conclusive that defendants in error have not complied with their contract and that plaintiff in error had the right to reject the goods in their entirety and defeat the action for their price. It was error for the trial court to refuse the motion for a directed verdict.

But assuming, for the sake of the argument, that the question of the performance of the contract on the part of defendants in error, was a proper question for the jury to determine, we submit that the question should have been submitted to the jury under proper instructions. This subject will be discussed under the next heading.

## 2.

THE COURT ERRED IN REFUSING TO GIVE INSTRUCTIONS NUMBERED 3 AND 6, REQUESTED BY PLAINTIFF IN ERROR.

Plaintiff in error duly requested the trial court to give its Instruction No. 3, reading as follows, to-wit: (R. p-86.)

**"INSTRUCTION NO. 3**

If you find that the defendant ordered the goods, wares and merchandise sued on and gave the order as contended for by the plaintiffs, and said order was not procured through fraud, as alleged by the defendant, and you find that the person who signed said order on behalf of the defendant company, to-wit; J. C. Shaw, had authority or apparent authority, as will hereafter be explained, to order said goods on behalf of the defendant company, and if you find further that the plaintiffs delivered or tendered a delivery of the steel called for by the contract, to the defendant at Hoquiam, Washington, and the defendant wrongfully refused payment therefor, then you will find for the plaintiffs for the amount agreed to be paid for said goods, as provided for in said order, with interest. In determining the fact, whether or not the plaintiffs have complied with their contract in delivering or tendering delivery to the defendant of the steel ordered, if you find it was ordered, I instruct you that to constitute a good delivery in law, so as to make the defendant liable for said steel, the same must correspond in quantity and in kind and description with that named in the order. The defendant was not obliged to accept any less or any greater number of bars of steel than ordered, nor was the defendant obliged to accept bars of steel of any less or greater length than ordered, and if the steel, or any part thereof delivered or tendered to the said defendant, did not comply with the contract in this, to-wit: that said bars of steel were less or greater in number than shown on the order sued on, or said bars of steel, or some thereof, were not of the length specified in the order, but were of a greater or less length, then the defendant had a right to reject the whole of said order so delivered or tendered, because the failure of the seller, the



plaintiffs in this case, to deliver the quantity specified, or to deliver steel of the length specified, constituted a total breach of the contract. The plaintiffs in this case were bound to tender or deliver the number of bars of steel called for, and were bound to tender bars of steel of the length called for, and if you find that the plaintiffs did not deliver or tender delivery of the number of bars of steel specified in the order, or the bars delivered or tendered were of greater or less length than twenty feet cut in two, then you will find your verdict for the defendant."

The plaintiff in error also requested the trial

court to give Instruction No. 6, which is substantially the same instruction as Instruction No. 3, with some minor changes. The court refused to give either of these instructions, and exceptions to the court's refusal to so instruct were duly taken and allowed, before the jury retired. (R. p. 85.)

The court did, however, give the first portion of Instruction No. 3, concluding with the words:

"I instruct you that to constitute a good delivery in law, so as to make the defendant liable for said steel, the same must correspond in quantity and in kind and description with that named in the order."

This is the only light that the jury was given on this most important question. It was merely a statement of a general rule of law, without any application to the particular facts of the case. The instruction given was entirely too general and did not inform the jury whether a strict or a substantial compliance of this contract on the part of defendants in error, was

necessary. We submit that if the jury had consisted of twelve lawyers of average ability, they would not have agreed as to the proper construction of this instruction with reference to the particular facts of the case. Either Instruction No. 3, or Instruction No. 6, or the substance of either one of these instructions, should have been given to the jury by the trial court, and it was error not to do so. Our position is emphasized by the fact, that after the court had instructed the jury, a juror asked the following question:

“Q. I would like to ask about the weight. I am a little mixed on that, as to the shipment of the order.”

The court answered:

“You are the sole judges of the facts and the evidence, and a great part of it is written and part of it has gone in by word of mouth and you will have to settle that by yourselves.” (R. p. 85.)

It was very evident why the juror was confused. The only evidence in the case, with reference to the length of the bars shipped, was the evidence of witnesses produced by plaintiff in error, and this testimony showed that the lengths of practically all the bars were in excess of the lengths specified in the order, and the summary introduced in evidence as Exhibit “G”, showed a total overweight on the excess lengths, of 2,709 pounds. The juror, having this in mind, was in doubt as to the law on this proposition.

Had the court properly instructed the jury on the subject, and had the court given Instruction No. 3 requested by plaintiff in error, the jury would have fully understood the situation and would not have been confused. The court erred, therefore, in not giving the instructions requested, or the substance thereof.

Rush vs. Spokane Falls & North Co., 23 Wash., 501-511.

Zolawenski vs. Aberdeen, 72 Wash., 95-97.

Howe vs. West Seattle Land Co., 21 Wash., 594-600.

Lownsdale vs. Grays Harbor Boom Co., 21 Wash., 542-547.

Murphy vs. Chicago, Milwaukee etc. Ry. Co., 66 Wash., 663-669.

Duggan vs. Pacific Boom Co., 6 Wash., 593-596.

Enoch vs. Spokane Falls Ry. Co., 6 Wash. 393-399.

Wilson vs. Waldron, 12 Wash., 149-150.

The trial court having committed error in refusing to grant plaintiff in error's motion for a directed verdict, and in refusing to properly instruct the jury on the question of the performance of the contract, should have set aside the verdict and the judgment

and granted plaintiff in error's motion for a new trial.

We respectfully submit that the cause should be reversed and dismissed, or a new trial granted.

Respectfully Sumbitted,

T. B. BRUENER & J. B. BRIDGES,  
Attorneys for Plaintiff in Error.



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IN THE UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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POLSON LOGGING COMPANY, a  
corporation,

*Plaintiff in Error,*

*vs.*

GUSTAVE H. NEUMEYER and  
ABRAHAM J. DIMOND, co-part-  
ners doing business under the name  
and style of NEUMEYER & DIMOND,

*Defendants in Error.*

No. 2584.

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UPON REVIEW FROM THE UNITED STATES  
DISTRICT COURT, FOR THE WESTERN  
DISTRICT OF WASHINGTON,  
NORTHERN DIVISION.

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**Brief of Defendants in Error**

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Seattle, Washington.

BRIEF OF RESPONDENTS IN ERROR.  
STATEMENT OF THE CASE.

The statement by plaintiff in error is his conclusions from the pleadings and is in no sense a statement of the facts. A fair statement of the controversy as presented to the jury and the trial court is as follows:

The plaintiff co-partnership sued the defendant corporation for the sale and delivery of a carload of steel of the agreed and reasonable value of \$3,895.39, and interest. The kind, quantities and description of the steel were fully described in an exhibit attached to the complaint. (R. pp. 3-6.)

Defendant's answer denied all the allegations of the complaint except it admitted its corporate capacity and its refusal to pay, and affirmatively alleged:

(1) That the order for the steel was procured by fraud; and

(2) Was given by an agent without authority. (R. pp. 6-10.)

These matters were denied in the reply. (R. p. 10.)



September 11, 1912, M. C. Sulcove, travelling salesman for Neumeyer & Dimond, received from J. C. Shaw, of Polson Logging Co., an order for steel. (R. p. 19.) This order was signed, "Polson Logging Company, by J. C. Shaw." (Pl. Ex. No. 1.)

After May 14, 1913, the following information was at hand:

February 6, 1913, the steel was shipped and February 18, 1913, Polson Logging Company received from defendants in error invoices for the steel. (R. p. 64, Pl. Ex. No. 4.) These invoices gave the quantity, size, description and weight (Def. Ex. "F"), approximate weight per foot, approximate length, and approximate length per bar of each and every bar, the total weight, and the value of the shipment (Def. Ex. "E").

Polson Logging Company, on receipt of the invoices, took the following position:

(1) Denied giving the order, or any order of any kind. (Pl. Exs. No. 2, No. 3 and No. 4.)

(2) Accused Neumeyer & Dimond of forging the signature of its agent, Shaw. (Pl. Ex. No. 7.)

(3) Charged Neumeyer & Dimond with fraud in securing the order. (Pl. Ex. No. 7, R. p. 121.)

(4) Said Shaw had no authority to buy (Def. Ex. "J," R. p. 184), and in its Answer alleged he

was only the bookkeeper. (R. pp. 8 and 9.)

(5) Complained of the sizes. (Def. Ex. "J.")

(6) Made no objection to the lengths or the weights.

Before any objections were made the steel had been shipped and the greater part arrived in Hoquiam, Washington, on the 11th day of March, 1913 (Pl. Ex. 11, Def. Ex. "I"), and the balance on May 14th, 1913 (Pl. Ex. No. 12, Pl. Ex. No. 13).

It was refused on account of not having been ordered. The freight bill, marked Def. Exhibit "A," shows on its face, "*Refused a/c not ordered.*" (R. p. 131.) A letter of the Northern Pacific Railway Company addressed to Neumeyer & Dimond, dated May 10th, 1913, reads: "*This shipment arrived at Hoquiam on March 11, and same was refused by consignee on account they claim not ordered.*" (Def-Ex. "I," R. p. 183.)

September, 1913, William E. Neumeyer and Sulcove, the salesman, called upon Polson at Hoquiam to effect a settlement, saw Shaw, Robert Polson and Alexander Polson, and were advised that Polson refused to take the steel for the reason that order was not procured in good faith (R. pp. 19-20), and during the trial President Polson, on cross-examination, said:

“Q. (By MR. ROBERTS): You would not have taken it if you had known it was there?”

“A. If I had known it was shipped by Neumeyer & Dimond on this same order I would not have taken it, no sir.” (R. p. 170.)

Mr. Bruener, counsel for the company, in his opening statement to the jury, said:

“That the steel was rejected at that time and it has always been rejected and has never been accepted by this company and that they deny liability for that steel.”

Plaintiff in error before filing its answer made a motion to inspect the original and said in its motion:

“That defendant’s defense will be a denial of the giving of the order, or of any order, in the form sued on, and that the signature of J. C. Shaw to an order was procured by trickery and fraud.”

In all the correspondence and in all of the conversations regarding the refusal of the defendant to accept this shipment, the only grounds given were:

- (1) That no contract existed.
- (2) That the order was a forgery.
- (3) That the order was procured by fraud.

(4) That Shaw had no authority to make purchases for defendant company, being a mere book-keeper.

- (5) That the sizes were not correct.

In all the correspondence and conversations

regarding the refusal to accept this shipment the lengths and weights were never disputed, although full and complete data was before Polson on February 18, 1913, down to the day of the trial and the steel was in the freight depot at Hoquiam after March 11, 1913, in part and the balance after May 14, 1914. (R. p. 64, Pl. Exs. No. 2, 11, 12, 13, Def. Exs. "E" and "F.")

On this state of facts the cause came on for trial on the 24th day of September, 1914. Defendants in error first placed upon the stand Shaw, who was alleged in the answer to be its bookkeeper, and without authority to buy for the corporation. (R. pp. 8-10.) Shaw testified that he was *not* the bookkeeper as alleged in the answer, and in fact testified that he *never* kept the books, and admitted that he purchased 95 per cent of all the material used by the company. (R. p. 28.)

On appeal this defense is waived.

Sulcove was next placed upon the stand. He testified to the manner in which the order was secured and to the signature of Shaw. (R. pp. 18-19.) Shaw, during the trial, admitted his signature. (R. p. 28.)

On the question of fraud the court said in his instructions to the jury:



“The court is not exactly clear what Mr. Shaw’s position there is.” (R. p. 24.)

On appeal the defense of fraud is abandoned.

Defendant in error next called William E. Neumeyer, who testified that for generations his family had manufactured steel in Germany and in the United States (R. p. 22); that his sales amounted to about \$125,000.00 each year on the Pacific Coast (R. p. 24). He testified that in September, 1913, he had endeavored to reach an understanding with the Polsons about the steel; that they refused to discuss the matter with him, except to say the order was fraudulently procured (R. p. 22). He testified further that he had gone to the freight depot where the steel in question was in storage, talked to the freight agent, saw the bills of lading and the steel, and that the steel was shipped *exactly* in accordance with the order given by the company (R. p. 22). The bills of lading corroborated Mr. Neumeyer’s testimony (Pl. Exs. 11 and 12).

The tabulations set forth in defendant’s Exhibits “C” and “D” were made by its agents in September, 1914 (some two years after the order was given, and some eighteen months after delivery had been made), show that the shipment was twelve bars short and 2,645 pounds short. Over night

Neumeyer, by the greatest effort, procured invoices and shipping bills from Seattle (R. pp. 66-69; Pl. Ex. 12), and a telegram from the freight agent of the railway company at Hoquiam (this witness had testified for Polson the day before), stating and admitting that the twelve bars, weighing 2,645 pounds, had arrived and had been delivered on May 14th (Pl. Ex. 13).

On appeal plaintiff in error makes a *new* defense. It contends that each bar of steel, with the exception of the last item in the order, should be literally and exactly twenty feet long cut in two equal parts, that is, exactly ten feet long. It asserts that the evidence conclusively shows that (1) each bar of steel, with the one exception, should have been exactly ten feet long, and (2) that the bars were not ten feet long; that the law of the case requires a strict and literal performance of each term of the contract as a condition precedent to recovery, and, therefore, that the motion for a directed verdict should have been granted.

*Secondly*, it contends that the court's instructions were insufficient and inadequate, and that its requested instructions numbered three and six, to the effect that a strict and literal performance of the contract must be proved, should have been given.

The only evidence on this point was a colorable statement on the part of Sulcove, when, on cross-examination by counsel for Polson, speaking not of *all* the bars of steel but on the number of bars and lengths of Dog Hook steel, he said:

“Q. (MR. BRUENER) Twenty-five bars of 1x2 Dog Hook steel?

A. Yes, sir.

Q. That was given to you?

A. Yes, sir.

Q. All *those* bars were to be twenty feet long cut in two?

A. Yes, sir.” (R. p. 20.)

On that little excerpt from the testimony given by the witness in a three-day trial Polson Co., disregarding the positive testimony of Neumeyer, the bills of lading, the invoices and its two years' silent acquiescence and the total absence of any evidence on its own part, contends that it is *conclusively* established that (1) each bar of steel should be exactly ten feet long, and (2) non-compliance.

## ARGUMENT.

### MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

This motion was properly stricken. Such motion cannot lie in the Federal Court.

*Slocum vs. New York Life Insurance Co.*, 228 U. S. 364.

*Young vs. Central Railway Co. of New Jersey*, 232 U. S. 602.

Also see :

*Forsyth vs. Dow*, 81 Wash. 137, 142 Pac. 490.

#### MOTION FOR NEW TRIAL.

The trial court is vested with discretion in granting or refusing a new trial. The ruling of the trial court in refusing a new trial will not be reviewed.

*Ward vs. Joslin*, 186 U. S. 142.

*Tacoma Railway & Power Co. vs. Geiger*, 145 Fed. 504.

In the last case the court said :

“That the refusal of the trial court to grant a new trial is not the subject of an assignment for error here has been decided too often to require a citation of the decisions.”

#### MOTION FOR DIRECTED VERDICT.

The motion for a directed verdict was properly decided, the evidence being sufficient to constitute at least a *prima facie* case.



The Circuit Court of Appeals for the 6th Circuit in *McIntyre vs. Modern Woodmen of America*, 200 Fed. on p. 1, said:

“The rule is well settled that it is the duty of the court when a motion is made to direct a verdict to take that view of the evidence most favorable to the party against whom such instructions is asked (*Nelson vs. Ohio Cultivator Co.*, 108 Fed. 620-629, 112 C. C. A. 394, and cases cited) and that the mere fact that there is a preponderance of the evidence in favor of the party moving for the instructed verdict does not require the judge to take the case from the jury even though it might justify the granting of a new trial.”

*Rochford vs. Pennsylvania Company*, 174 Fed. 81-83, 98 C. C. A. 105.

*Hales vs. Michigan Central R. Co.*, 200 Fed. 533 (6th).

The Circuit Court of Appeals for the 8th Circuit, in *Liberty Bell Coal Mining Co. vs. Smuggler-Union Mining Co.*, 203 Fed. 795, said:

“To justify a court in withdrawing an issue from the jury it must appear that, giving the evidence the strongest probative force against the party asking for the withdrawal, there was no substantial evidence which would warrant a jury in finding that issue against him. It is only when all reasonable men, in the honest exercise of a fair and impartial judgment, would draw the same conclusion from the evidence on that issue, that it is the only duty of the court to withdraw it from the jury.

*Railroad Company vs. Pollard*, 22 Wall 341, 22 L. Ed. 877; *Grand Trunk R. R. Co. vs. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Texas & Pacific R. R. Co. vs. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186; *St. Louis, Etc., R. R. Co. vs. Leftwich*, 117 Fed. 127, 129, 54 C. C. A. 1, 3; *Chicago, etc., Ry. Co. vs. Roddy*, 131 Fed. 712, 717, 65 C. C. A. 470, 475; *Insurance Co. vs. Hoover Distilling Co.*, 182 Fed. 590, 598, 105 C. C. A. 128 31 L. R. A. (N. S.) 873."

The Circuit Court of Appeals for the 4th Circuit, in *Norfolk, etc. Ry. Co. vs. Hauser*, 211 Fed. 567, said:

"At the close of the testimony it is the duty of the trial judge to direct a verdict wherever: First, the evidence is wholly undisputed, or, second, but one inference could be drawn from the evidence by reasonable men, so as that the court in the exercise of a sound judicial discretion would be compelled to set aside a verdict returned in opposition to it. *Patton vs. Texas & Pac. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Marande vs. Texas & Pac. Ry. Co.*, 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487."

"The test in the second class of cases is not how in the court's opinion the preponderance of the testimony may be, but whether it is adequate to go to the jury; that is, whether the evidence is sufficient upon which a jury might base an inference and if different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves. *Washington Gaslight Co. vs. Lansden*, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543; *Marande vs. Texas & Pac. Ry. Co.*, 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487."

"The jury is not to guess or conjecture as to possible explanations to account for a result, when such conjecture or explanation is not supported by any reasonable inference from the testimony in the case; but, when the cause of the occurrence cannot be shown by positive testimony, the jury is entitled to draw inferences from the circumstances contemporaneous with or surrounding the occurrence, and the only question is whether they afford any reasonable ground upon which a jury, in the exercise of its functions, can draw an inference. *Marande vs. Texas & Pac. Ry. Co.*, 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487; *Waters-Pierce Oil Co. vs. Deselms*, 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453."

"Cases are not lightly to be taken from the jury. Jurors are the recognized triers of questions of fact, and ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them, and parties are entitled to be secured in the enjoyment of their constitutional right to trial by jury, when the case is one proper to be decided by them, as one of fact and not to be concluded as a matter of law by the court. *Patton vs. Texas & Pac. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Marande vs. Texas & Pac. Ry. Co.*, 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487."

The Circuit Court of Appeals for the 3rd Circuit, in *United States vs. Erie Ry. Co.*, 212 Fed. 853, held:

"When the evidence given at the trial with all the inferences the jury could justifiably draw from it is insufficient to support a verdict for the plaintiff so that such a verdict if returned must be set aside, the court is not bound to submit the case to the jury but direct a verdict for the defendant."

The Circuit Court of Appeals for the 5th Circuit, in *Sloan et al. vs. Herndon et al.*, 213 Fed. 779, held:

“Upon this subject the Supreme Court, in the case of *Texas & Pac. Ry Co. vs. Cox*, 145 U. S. 606, 12 Sup. Ct., at p. 909, 36 L. Ed. 829, has announced the following rule:

‘The case should not have been withdraw from the jury unless the conclusions followed as a matter of law that no recovery could be had upon any view which could be properly taken of the facts or the evidence tended to establish.’ ”

*Dunlap vs. N. E. Railroad*, 130 U. S. 649-652.

*Cain vs. Michigan Central Ry.*, 128 U. S. 91.

*Jones vs. E. Tennessee, Virginia & Georgia Ry.*, 128 U. S. 443.

*McCallman vs. Illinois Central Railway Co. et al.*, 215 Fed. 465.

Also see the decision of the Circuit Court of Appeals for the Ninth Circuit in *Shank vs. Great Shoshone & Twin Falls Water Power Co.*, p. 836, 205 Fed. 833, on motion for non-suit.

“The rule adopted by this court, and indeed by most courts, is that where the minds of reasonable men may differ as to the legal sufficiency of the evidence, the jury, and not the court, must determine the issue.”



*Thoresen vs. St. Paul & Tacoma Lumber Co.*,  
73 Wash. 99, 131 Pac. 645, 132 Pac. 860.

See also:

*Atwood et al. vs. Washington Water Power Co.*, 79 Wash. 427, 148 Pac. 343 (1914).

Under the foregoing recent decisions it is very clear that the court properly denied the motion for a directed verdict.

Neumeyer's positive testimony that he had seen the steel in the freight depot at Hoquiam and that it was exactly in accordance with the order was sufficient to carry the question of fact to the jury.

There is not a syllable of evidence contradicting the testimony of Neumeyer, that the steel was there at the time delivery was made or shortly thereafter.

A tender was actually made when bills of lading and invoices were sent to plaintiff in error.

Concerning the *weight* to be given plaintiff in error's testimony the following considerations are pertinent:

(1) This testimony in its very nature is untrustworthy. The evidence in this case with the greatest aptness and force illustrates the danger of such evidence, to-wit:

Polson caused his agents to go to the freight depot in September, 1914, and count, weigh and measure certain steel and the said agents testified in court that the shipment was twelve bars short and 2,645 pounds short. The freight agent for the Northern Pacific corroborated the testimony of these agents and so the matter stood when court adjourned on the evening of September 25th, 1914. By extraordinary efforts Neumeyer was, over night, able to secure the admission by telegraph of this same freight agent of the Northern Pacific at Hoquiam that the said twelve bars, or 2,645 pounds, had actually been delivered in his freight depot and that said twelve bars had been taken away (Pl. Ex. 13). The shipping bills show the shipment of these twelve bars (Pl. Ex. 12, R. pp. 66-68).

It is our conclusion that defendants in error not only made a *prima facie* case on this question but that they established delivery by a preponderance of the evidence.

(2) Let us consider in detail the contention that each bar should have been exactly ten feet long. (1) Neumeyer's positive and uncontradicted testimony showed the goods were shipped *exactly* in accordance with the order given. (2) The invoices, appearing in evidence as defendant's Exhibits "E"

and "F," gave the quantities, sizes, description, weight, approximate weight per foot, approximate length and approximate length per bar of each and every bar of steel in the shipment and that invoice (Def. Ex. "F") was received *February 18th, 1913*. Polson made no objection whatsoever to the length of the bars of steel described in that invoice, or to the number of pounds of each bar. Defendant knew exactly what the shipment contained. Sulcove and Neumeyer called upon defendant in September, 1913, and no objection was made to the length or to the weight of the bars. *Not one word of objection was ever made to the length of the bars or the weight of this shipment during the two years elapsing from the time the order was given until the trial. This shipment never was refused or objected to on the ground of lengths or weights.* These facts are all established without contradiction. If the parties for two years dealt with one another, calling one another's attention to the length of these bars, and to their weight, without objecting or protesting in any manner the length or weight, one would think that there was a perfect and absolute agreement upon lengths and weights.

Counsel for plaintiffs in making the foregoing statements have not overlooked the fact that the

president of the Logging Company swore, "That his company first learned of any discrepancy in the number of bars and in the amount, character and description of the steel sent, with that specified in the order, was shortly before the trial, and after Mr. Mills and Mr. Flurshultz had measured and weighed the same." (R. p. 66.)

The law charges him with notice.

"As has been seen, the buyer has the right to inspect the goods and is then bound to accept them if they conform to the contract or to reject them if they do not. He is bound, however, to do one thing or the other, and within a reasonable time; and if he simply remains inactive, neither accepting or rejecting, within a reasonable period, the law will deem his inaction to be acquiescence and he will not afterwards be permitted to reject."

*Meacham on Sales*, Vol. II, Sec. 1380.

It appears in evidence, according to defendant's Exhibit "F," that the exact data was before Mr. Polson on February 18th, 1913 (R. p. 65) and all the steel was there after May 14, 1913, for his examination.

*Plaintiff in error, to disprove the positive testimony of Mr. Neumeyer and to contradict the invoices, offered no evidence whatever at the trial.*

They now seize upon the unadvised statement of Sulcove, taken from its natural setting, that each



bar should be twenty feet cut in two, and base this appeal thereon.

This, notwithstanding the invoice had been received by defendant, without objection, and acquiesced in for two years.

The court will note that the written contract does not specify the length of each bar. After listing some two hundred and ninety bars, the order provides that "bars twenty feet long cut in two at  $12\frac{1}{2}$ c lb.," and then provides that certain bars of eight feet cost 17c per pound. The natural and logical conclusion from reading the order is that twenty foot lengths should sell for  $12\frac{1}{2}$ c per pound and that the 8-foot bars should be 17c per pound. This is far from an effort to fix the length of each bar at twenty feet. Obviously, had the parties intended to contract for the exact length of each bar of steel they would not have said that each bar should be twenty feet long cut in two, or thirty feet cut in three or forty feet cut in four, but would have said each bar shall be ten feet long. The only logical inference to be drawn from the written contract is that all bars twenty feet or more in length should be cut in two, and so they were, and *the parties by their conduct and by their course of dealing have established the fact clearly and positively*

*that these bars of steel should be of the class of twenty feet or more.*

It is a striking fact that not one of the defendant's witnesses testified that each bar of steel should be ten feet long or literally twenty feet long cut in two, nor is there any evidence to show that a length of ten feet was given for the particular purposes of defendant's camp. Defendant makes no such contention. The record does not show that the length was at all material. This is not a case of the manufacture of structural steel to go into some great building where each bar must be of a certain and exact length to fit into the other part of the structure, but this steel was for the blacksmith shops operated by the defendant company in its several logging camps, and it was of no importance in the making of horse shoes, chocker-hooks, tools, etc., whether the steel was of certain fixed length—five, ten, twenty or thirty feet.

Read the testimony of Sulcove on pp. 20 and 21 of the record and note the pretext upon which counsel for Polson makes his contention as to the exact length of each bar. After referring to the number and sizes of other kinds of steel, counsel for defendant said:

“Q. (MR. BRUENER) Twenty-five bars 1x2 dog-hook steel?

A. Yes, sir.

Q. That was given to you?

A. Yes, sir.

Q. All of *those* bars were to be twenty feet long cut in two?

A. Yes, sir.”

Sulcove was testifying about only a small number of the bars found in the order namely, the bars of dog-hook steel. Giving full force and credit to a literal interpretation of this testimony by Sulcove it establishes this: That the dog-hook steel should be ten feet long, or literally twenty feet cut in two. It is limited to dog-hook steel, and has no application to all the other bars of this shipment. It follows that there was a substantial compliance with the contract.

We repeat that on appeal Polson sets up a new and different defense.

If counsel went into this case to establish the defense that each bar of steel should be exactly ten feet long and intended to prove that fact, it seems to us that he would have directly, unmistakably and unequivocally placed that contention before the court and jury by no uncertain showing, and would

have offered evidence that *all* the bars were to be ten feet long, and he would have so stated to the jury in his opening statement. He would have placed witnesses from the camp upon the stand—the head machinist, the head carpenter, Shaw, the Polsons *et al.*—to prove that the bars of steel that they used and wanted in that camp were to be ten feet long and that the lengths specified in the order were ten foot lengths. He did nothing of the kind. He offered no proof at all.

In fairness to Sulcove he should have called his attention to the fact, if it be a fact, and not an afterthought upon the part of learned counsel in reading the record for the purposes of appeal and after he had failed in his defense, that this shipment was twelve bars short.

The fact is that any person having the order given in this case and answering counsel's question as worded by him would have answered just as Sulcove did, and would not have meant thereby that each bar of steel should be, literally, twenty feet long cut in two, but that bars should be of the class of twenty foot lengths, broken in two, and then not necessarily in equal lengths.

In addition, Sulcove's testimony is valueless. His testimony is the language of the written order



—word for word. Repetition is not explanation or interpretation.

That the length of the bars is absolutely immaterial is demonstrated:

(1) By the fact that no provision was made in the contract that each bar should be cut in *equal* parts. No evidence at the trial that each bar should be cut in two bars each ten feet long. No evidence at all as to the length of the parts.

(2) A total absence of evidence that a ten foot bar was either necessary or indispensable or important; that a difference of variation in any way defeated the objects which the parties intended to accomplish.

(3) No evidence that they even used such lengths in these camps.

See *Elliott on Contracts*, Vol. II, 912.

We say further that the corporation is estopped from raising this question of the length of the bars and their weight by its conduct during the two years of negotiation. It had a right to investigate this shipment upon delivery, and was duty bound to make an investigation; it had a full, complete and exact statement of all the lengths, sizes, quantities and weights of each and every bar on this shipment

in its possession from the 18th day of February, 1913, down to the day of trial, and *never* contended that these bars of steel should be ten feet long or literally twenty feet long cut in two; it went into the trial of this case contending that it had never ordered any steel from the plaintiffs in this case, that if any order was given it was procured by fraud, and was given by an agent without authority, finding fault only with the sizes; its president under oath said the company would not have taken the steel if it had all been there: these facts warrant an estoppel.

It says it would not have taken the steel if it had all been there! This refusal in open court, coupled with its two years of implied consent and its defeat on every outspoken and pleaded objection in the trial court, does not lend the color of good faith to the proposition now advanced in the appellate court.

#### INSTRUCTIONS TO JURY.

No error is predicated upon the instructions given the jury. An assignment of error is based upon the refusal of the court to give requested instructions III and VI.

These instructions were refused for the reasons given by the court:

“THE COURT: The case is over. I will say, Mr. Bruener, I think I went over in my general instructions what you are entitled to in those two refusals.” (R. p. 85.)

The court instructed the jury:

“It is alleged that on the date mentioned in this complaint that the defendant corporation gave the plaintiff an order for certain merchandise and that the plaintiff accepted the order and *filled it according to its terms* and that defendant has failed to abide by its terms and failed to pay the amount it agreed to pay when it gave the order.” (R. p. 22.)

“Now, in this case, before the plaintiffs can recover they must show by a fair preponderance of the evidence that the contract they sue on was with the defendant; that they performed it and that the defendant has not performed it.” (R. p. 73.)

“The burden of proof is upon the plaintiffs, as I pointed out to you, to show that the contract was made as they pleaded, and that it was performed by them, that is, they must, before they can recover in this suit, have furnished, as agreed by them when they accepted this order, *the kind, the amount* and the *description* of property included in the order for this merchandise; if they did not, they cannot prevail.” (R. p. 78.)

“The burden is upon them (plaintiffs) to prove the contract, the terms thereof, the performance of the contract on their part and also that the goods delivered or tendered to the defendant complied with the contract.” (R. p. 79.)

“If you further find that the plaintiffs delivered or tendered delivery of the steel called for by the

contract to the defendant at Hoquiam, Washington, and the defendant wrongfully refused payment thereof, then you will find for the plaintiffs for the amount agreed to be paid for said goods, \* \* \* and I instruct you to make the defendant liable for said steel—the steel must correspond *in quantity* and *in kind* and *description* with that named in the order.” (R. pp. 80-81.)

The foregoing instructions fairly presented to the jury the issue of delivery in accordance with the contract. The jury were told that Neumeyer & Dimond had alleged that they delivered the goods in compliance with the order and that to constitute a good delivery in law the shipment must correspond *in amount, in quantity, in kind and description with that named in the order*. That is a correct statement of law to which defendant has not excepted and in fact covers substantially all that is contained in the requested instructions which were refused. The trial court so informed counsel at the time. The fact that the court refused the instructions asked does not constitute error as long as the instructions given are correct statements of the law and cover the questions raised by the instructions refused. In other words, a requested instruction is properly refused when all its propositions have been embraced in the instructions given by the court.



*Coffin vs. U. S.*, 162 U. S. 664.

*Rio Grande R. R. Co. vs. Leak*, 163 U. S. 280.

*Agnew vs. U. S.*, 165 U. S. 36.

If the case is fairly put to the jury it is all that can reasonably be asked.

*Ayres vs. Watson*, 137 U. S. 584-601.

The refusal to give a requested instruction in the words of counsel is not error where the court embodies the substance of the instruction in his charge.

212 Fed. 69-75 (C. C. A. 8th).

The jury under these instructions found every fact against the corporation and that is the end of this litigation.

The instructions requested by the corporation were not correct statements of the law and were so erroneous that the court was precluded from giving them, for the following reasons:

(1) Both instructions assumed that the seller had failed to deliver the quantity specified or the lengths specified. The instructions should have included the clause "*If there was a failure*"; otherwise the instructions assumed the very question of fact that the jury was called upon to decide.

2. The instructions assumed that each bar should be exactly twenty feet long cut in two—a disputed question of fact.

(3) The corporation was not entitled to an instruction that Neumeyer should deliver or tender delivery of the merchandise for the reason that by rejecting the shipment on certain stated grounds the corporation waived its right to object on other grounds. The question of waiver will be discussed later.

(4) The requested instructions numbered III and IV are based on the theory that a strict and literal compliance with a contract of this nature is required by law. This was undoubtedly the old common law rule, as plaintiff in error's brief shows, but the modern rule announced by recent decisions is that a *substantial compliance* is sufficient.

Such instructions as defendant proposed were expressly disapproved by the Court of Civil Appeals of Texas in *Richardson et al. vs. Herbert*, 135 S. W. 628, where the court held, in a suit for the recovery of the purchase price of a number of ties, that a substantial compliance with the terms of the contract was sufficient.

“The lower court charged the jury: ‘That an exact compliance with the terms of the contract

either as to dimensions or the quality of ties is not required by the law as a condition of recovery of the contract price; if the dimensions and quality of the ties delivered be so near the specifications contained in the contract as to amount to a substantial compliance therewith, then the law is satisfied.' "

The court approved this instruction and said:

"Under the old rule of the common law a strict and literal performance of the terms of the contract was required as a condition precedent but a more liberal rule now prevails, and a recovery may be had if there has been *a substantial compliance with the contract*. If a contract is performed in good faith in all substantial particulars, the party so performing should recover the contract price, less any damages that may have accrued by reason of the deviation from the strict and literal terms of the contract."

"In the case of *Linch vs. Paris Lumber & Grain Elevator Co.*, 80 Tex. 23, 15 S. W. 209, which is cited by appellants in support of their proposition, the the court said: 'The objection to the part of the charge that instructs the jury that the evidence must show a substantial compliance of plaintiff with the terms of the contract rests upon the proposition that a literal performance was required in each and every particular. Such precision cannot, we think, be demanded in the performance of contracts or any other affair of life.' The court quotes with approval as follows from the New York case of *Smith vs. Gugerty*, 4 Barb (N. Y.) 620: 'If there is an honest effort to perform the contract according to the letter, and it is substantially fulfilled, the builder should be entitled to receive the reward of his labor, although he may not (as the architect employed in

this case has certified) have in every instance complied with its terms literally in every punctilio. A substantial compliance without any intentional variation should in all cases be considered as a full performance of a condition, whether precedent or subsequent.' The opinion in the Texas case was in regard to a charge similar in terms to the one in the case at bar, and is supported by the consensus of opinion in the United States. *Fitzgerald vs. La Porte*, 64 Ark. 34, 40 S. W. 261; *Hill vs. McKay*, 94 Cal. 5, 29 Pac. 406; *Aetna Works vs. Kossuth County*, 79 Iowa 40, 44 N. W. 215; *Hattin vs. Chase*, 88 Me. 237, 33 Atl. 989; *Phelps vs. Beebe*, 71 Mich. 554, 39 N. W. 761; *Leeds vs. Little*, 42 Minn. 414, 44 N. W. 309; *Crouch vs. Gutmann*, 134 N. Y. 45, 31 N. E. 271.; 30 Am. St. Rep. 608; *Moore vs. Carter*, 146 Pa. 492, 23 Atl. 243; *Meincke vs. Falk*, 61 Wis. 623, 21 N. W. 785, 50 Am. St. 157. Whether there has been a substantial performance of the terms of the contract is usually one of fact to be determined by a jury under the instructions of the court. *Linch vs. Lumber Co.* and *Crouch vs. Gutmann*, herein cited."

"The assignments attacking the charge are mostly based upon the question of a substantial compliance with the terms of the contract and as hereinbefore indicated cannot be sustained. *If a literal compliance with a contract to deliver lumber was required, every such contract would be destroyed. A literal compliance such as appellants demand would vitiate the contract* if a tie should fall short the hundredth part of an inch in dimensions, or if there was an infinitesimal portion more of sap than was specified in the contract. There is abundant testimony to show a substantial compliance with the contract, and the jury so decided. The question of performance was one of fact for the



jury. *Page on Contracts*, Secs. 1386-1388; *Phillip vs. Gallant*, 62 N. Y. 258; *Woodward vs. Fuller*, 80 N. Y. 312; *Drew vs. Goodhue*, 74 Vt. 436, 52 Atl. 971; *Charley vs. Potthoff*, 118 Wis. 436, 95 N. W. 124."

Instructions similar to those given by the court are set out as model instructions by *Brickwood Sackett on Instructions*, Vol. II, pp. 76, 77 and 78. These instructions were given by the court in *Strauss vs. National Paint Company*, 76 Miss. 343, 24 Southern 703.

The rule of substantial performance is the law of the State of Washington.

In *Taylor vs. Ewing*, 74 Wash. 214, 132 Pac. 1009 (1913), an agreement was entered into that Ewing would give his note for \$4,500 in consideration of plaintiff securing assignments from the creditors of Ewing of their accounts, and that the bankruptcy proceedings would be dismissed, and Ewing given back his store. Plaintiff secured assignments from all the creditors aggregating \$12,000, with the exception of two claims amounting to \$366.67 and \$40.29, the total indebtedness aggregating \$12,000. The court said:

"Taking into consideration that there were more than forty merchandise creditors, located in numerous towns and cities, with claims aggregating a total of approximately \$12,000, and that they were

all obtained and assigned with the exception of the two mentioned, we think there was a substantial compliance with the contract. The respondents are in no way prejudiced because two of the claims were not assigned before suit was instituted. Consequently they have no just ground to complain. In cases of this character the rule is that substantial performance is all that the law requires. The plaintiffs were, therefore, entitled to maintain their action. In 3 *Page on Contracts*, Sec. 1385, the rule is stated thus:

“ ‘The original common-law rule required a strict and literal performance as a condition precedent to recovery. *The modern rule permits recovery without a strict and literal performance if there has been a substantial performance* and the contractor has attempted in good faith to perform the contract. If a contract has been performed substantially and deviations from the contract have been made, but not wilfully or in bad faith, the party so performing can recover the contract price, less the amount of such damage caused by such deviations. The amount of such damages is usually the expense of completion according to the contract.’ ”

“See, also, to the same effect: *Drew vs. Goodhue*, 72 Vt. 426, 52 Atl. 971; *Morgan vs. Gamble*, 230 Pa. 165, 79 Atl. 410. Under the rule of these authorities, the right of the appellants to maintain the action is manifest.”

Even in the case of sureties and guarantors in the State of Washington all that the law requires

is substantial compliance with the terms of the contract.

*Noise vs. Adams*, 76 Wash. 412, 136 Pac. 696.

*Lazelle vs. Empire State Surety Co.*, 58 Wash. 589.

The Circuit Court of Appeals for the 9th Circuit has already held that substantial compliance with the contract is all that the law requires.

In *American Pacific Construction Co. vs. Modern Steel Co.*, 211 Fed. 849 (9th C. C. A.), the court said:

“A variance is suggested between the complaint and proofs in that the complaint alleges that the agreed amount of the steel to be delivered was 1,500 tons, and that there was no proof of any contract or agreement to deliver that amount. We have already seen that there was a valid contract entered into between these parties. The exact amount of steel in tonnage was not ascertainable until the steel was fabricated and weighed. There was ample proof tending to show that the amount would aggregate about 1,500 tons. Some witnesses thought it would be much less. But there is no room for saying that the proof in this respect is a departure from the allegations of the complaint. The objection is, therefore, without merit.”

The United States Circuit Court of Appeals for the 2nd Circuit, in *Whitcomb vs. Shultz*, 215 Fed. 75 (1914), said:

“The material question was whether the vending company manufactured machines substantially like the model. If it did, it performed its contract. It was not responsible for the operation of the machines. This question was fully and fairly presented to the jury, who decided it in the plaintiff’s favor upon a conflict of testimony and this finding is binding upon us.”

The Circuit Court of Appeals for the 3rd Circuit, in *Pitcairn vs. Philip Hiss Co.*, 113 Fed. 492 (1902), an action brought for decorating, furnishing and refitting a house of the plaintiff, said :

“The defendant contended to the court and jury, as appears by the record, that, by reason of a defective construction of the woodwork in the daughter’s room, there could be no recovery of the amount agreed to be paid to the plaintiff, under the contract for its furnishings and decoration ; that the contract was an entire one, and, with this admittedly defective construction, there was not a substantial performance of the same.

“Whether this entire contract has been substantially performed was a question of fact for the jury. They might well be told that, in determining this question, they need not take into account any slight or unimportant defect, or one that could be easily remedied by a deduction from the agreed price, as such do not necessarily make it impossible to truthfully declare that an entire contract has been substantially performed ; but whether such alleged defects are substantial or unimportant is a question of fact for the jury. Substantial performance of the entire contract is sufficient, and the jury may properly so find.”



See:

*German Savings Inst. vs. De La Vergen Refrigerating Co. et al.*, 70 Fed. 146.

In *Woodruff et al. vs. Hough et al.*, 91 U. S. 596, where the contract was entered into for the construction of a jail in accordance with the plans and specifications and the contractor agreed to make and erect all the wrought iron work according to said plans and specifications, Mr. Justice Miller said:

“It is conceded on the part of the plaintiffs that, in several important particulars this work is not in accordance with the plans and specifications, but it is also insisted that a literal compliance with the plans and specifications in those respects is practically impossible.

“The court repeated the details of the contract on the points where the failure was alleged, and then told the jury that unless the contractors had *complied substantially with these specifications, or a strict compliance therewith had been waived*, they could not recover. The charge was very full and covered the whole ground necessary to enable the jury to apply the law to the matters in issue. We do not find in it any error.

“The fact that Allen will, under the judgment recovered by defendants in error, taken in connection with the amount he has to pay to others to complete the wrought-iron work, be a loser to the amount of several thousand dollars, does not prove the instruction of the court to be wrong. If there

was any error, it was committed by the jury, and not by the court. It is only another one of those cases, so common from that circuit, in which, with the whole charge of the court and much of the testimony in the bill of exceptions, this court is expected to retry the case as if it were both court and jury. Our repeated refusal to do this will be adhered to, however counsel may continue to press on our attention the mistakes of juries. They are beyond our jurisdiction."

The case at bar is within the rule laid down by the United States Supreme Court in the case above under both alternatives:

1. Substantial compliance.
2. Strict compliance waived.

#### WAIVER.

##### I.

Defendant waived its right to defend on the ground that there was a variation in quantities by denying the existence of the contract and any liability thereunder.

In *Meincke vs. Falk*, 61 Wis. 623, 21 N. W. 785, 50 Am. Rep. 157, the parties contracted for a carriage according to a certain model selected. The carriage furnished was substantially a duplicate of the model and the court held that this was sufficient compliance with the contract. Then the court said:

“Besides it must be borne in mind that the defendant did not refuse to accept the carriage because it was not such as was ordered; but the refusal to accept was placed upon the distinct ground that no legal contract had ever been made to purchase the carriage. The case was litigated upon this ground alone, as the elaborate opinion of Mr. Justice Cassoday on the former appeals shows. See 55 Wis. 427, 42 Am. Rep. 722. Now the defendant seeks to change his position and justify the refusal to accept on the ground that the carriage tendered was not such as was ordered; that it did not comply with the contract. This objection, at this late day, comes with bad grace, and is hardly consistent with the rules of good faith and honest dealing. The defendant should have said, when the carriage was finished and he was called upon to take it, that it was not such a carriage as he had contracted for—that it was not like the Ball carriage, and objected to receiving it on that ground. But this he did not do. The refusal to accept was placed upon the ground that he never bought the carriage and did not want it. This furnishes an additional reason for submitting the case to the jury upon the evidence given on the trial.”

In the Federal Circuit Court for Missouri in *Davis & Ramik Building & Mfg. Company vs. Dix*, 64 Fed. 406, the court approved the *Meinke* case and stated:

“It was but following up this sound rule of commercial honesty that the Supreme Court, in *Railway Company vs. McCarthy*, 96 U. S. 258, held that if one party gives a reason for his conduct and decision touching anything involved in a controversy he is estopped after litigation has begun from

changing his ground and putting his conduct upon another and different consideration.”

## II.

The Supreme Court of the State of Washington in *Zeimantaz vs. Blake*, 39 Wash. 6, held:

“It is complained in this connection that the tenders were insufficient, but we think the appellant is estopped to complain of this. Had he refused to perform the contract because he had not been tendered payment in full, and appeared in the action and defended on that ground, he probably could have succeeded in defeating a recovery of costs against him, if his contention should have proven true, though not the performance of the contract. But the appellant did not object to the tender when made on the ground that enough was not tendered him, nor did he defend this action on that ground. *He denied any liability whatsoever under the contract, and it is on that ground that he must succeed now, if he succeeds at all.*

The Supreme Court of the United States has held that a tender of performance is unnecessary where it appears that it would not have been accepted or it is reasonably certain that it would have been refused.

In *Hills vs. Exchange Bank*, 105 U. S. 319, the court said:

“That question is, whether the fact clearly established that their demand would have been unavailing, dispensed with the necessity of making the affidavit and demand. It is a general rule that



when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary, when it is reasonably certain that the offer will be refused—that payment or performance will not be accepted. Such is the doctrine established by this court in repeated decisions in regard to another branch of the law concerning the collection of taxes. *Bennett vs. Hunter*, 9 Wall. 326; *Tacey vs. Irwin*, 18 *id.* 549; *Atwood vs. Weems*, 99 U. S. 183.”

The principle announced in the foregoing case was reaffirmed in *United States vs. Lee*, 106 U. S. 196, and again in *United States vs. Edmondston*, 181 U. S. 500, p. 588.

*Whitcomb vs. Shultz*, 215 Fed. 75 (C. C. A. 2nd, 1914).

*Allegheny Valley Brick Co. vs. C. W. Raymond Co.*, 219 Fed. 477 (2 C. C. A.).

The Supreme Court of the State of Washington:

*Ward vs. Thorndyke et al.*, 65 Wash. 11 (1911), 117 Pac. 593, suit was brought to foreclose a mechanic's lien, plaintiff claiming that the parties had agreed that the work should be paid for \$200 cash and the balance by sixty-day note. Respondent claimed that the agreement was that one-half should

be paid cash and the balance in a ninety-day note. The court said:

“No formal tender of the note was necessary, since Ward’s testimony shows that any such tender would have been refused.”

*Windeberg vs. Naher*, 51 Wash. 591, 99 Pac. 736, 22 L. R. A. (N. S.) 956.

*Griesemer vs. Mutual Life Insurance Co.*, 10 Wash. 202, 38 Pac. 1031.

*Lawson vs. Sprague*, 51 Wash. 286, 98 Pac. 737.

*Clizer vs. Krauss*, 57 Wash. 25, 106 Pac. 145.

*Bruggeman vs. Converse*, 47 Wash. 581, 92 Pac. 429.

*Welsh vs. Caton*, 53 Wash. 309, 101 Pac. 1085.

“No tender is necessary if the contract has been repudiated by the buyer as by refusal to accept delivery tendered or notice to the seller that the buyer is unable to accept and pay for the goods.”

35 *Cyc.* 171.

*Gibbons vs. U. S.*, 8 Wallace, 269.

*Mattock vs. Young*, 66 Me. 469.

*Blair vs. Hamilton*, 48 Ind. 32.

*Duffy vs. Patton*, 74 Me. 390.

*Koon vs. Snodgrass*, 88 West Va. 320.

*Wallace vs. Hill*, 93 N. Y. 576.

*Holmes vs. Holmes*, 9 N. Y. 529.

*Smith vs. Poilou*, 87 N. Y. 594.

*McPherson vs. Walker*, 40 Ill. 371.

*Loftus vs. Riley*, 83 Iowa 503.

*Grant vs. Penbery*, 15 Kan. 236.

*Roberts vs. Mazeepa Mill Co.*, 30 Minn. 413,  
15 N. W. 680.

*Lapham vs. Bossemeyer*, 5 Neb. 343, 98 N.  
W. 699.

*Windmiller vs. Pop*, 107 N. Y. 674, 14 N. E.  
436.

*Calhoun vs. Vechio*, 4 Fed. cases, No. 2310.

*Beasley vs. Lovel*, 2 Ohio Dec. 378.

*Van Sickle vs. Nester*, 34 Hun. 64.

*Kily vs. Lee Canning Co.*, 105 N. Y. App.  
Div. 633, 93 N. Y. Supp. 986.

“It is a maxim that the law does not require a man to do a vain and fruitless thing. It has been held that a strict and formal tender is not necessary where it appears that if made it would

have been vain and fruitless. The rule may be stated as follows:

“An actual tender of performance may be excused when there is readiness and ability to perform, and actual performance has been prevented or waived by the party to whom performance is due.”

*Elliott on Contracts*, Sec. 1972.

When it is clear that a tender will not be accepted it need not be made. Thus a tender to one who announces in advance that he will not accept it is unnecessary. Accordingly where the purchaser of goods in advance of their delivery refuses to accept them the tender of the goods need not be made.

28 *Am. & Eng. Encyc. of Law*, 7.

Tender of performance by one party to a contract is not necessary where the other party absolutely repudiates the contract by denying its existence or by denying his liability under the contract.

28 *Am. & Eng. Encyc. of Law*, 8.

### III.

DEFENDANT ALSO WAIVED ANY OBJECTION TO VARIATIONS IN QUANTITY



## OF THE SHIPMENT BY REJECTING SAME ON OTHER GROUNDS.

“Where a tender is refused not on the ground of the amount being too small, but on some other ground, the objection to the deficiency of the amount is waived.”

*28 Am. & Eng. Encyc. of Law*, 18.

The Supreme Court of the State of Washington has held that objection on one ground is a waiver of defense on other grounds.

In *Gottschalk vs. Meisenheimer*, 62 Wash. 299, 113 Pac. 756, the holding was that “the refusal of a tender on the ground that it was not made in time precludes the party from subsequently objecting that it is not sufficient in amount.” (Syllabus.)

*Hidden vs. German Savings Bank & Loan Assn.*, 48 Wash. 384.

*Loverditz vs. Commonwealth Ins. Co.*, 57 Wash. 376, 106 Pac. 1122.

*Keene vs. Zindorf*, 81 Wash. ...., 142 Pac. 484.

The rule is well established that a purchaser of goods who refuses to accept them on a particular ground thereby waives other objections which he might have urged for such refusal.

*Oakland Sugar Mill Co. vs. Fred W. Wolf Co.*, 118 Fed. 239 (2nd C. C. A.).

*Braithwaite vs. Foreign Hardwood Co.*, 2 K. B. 543.

*Levy vs. Treen*, 1 El. & El. 969, 102 E. C. L. 969.

*Peterson vs. Mineral King Fruit Co.*, 140 Cal. 624, 74 Pac. 162.

*Montgomery vs. Thompson*, 152 Cal. 697, 92 Pac. 866.

*Hill vs. Fruits Mercantile Co.*, 42 Colo. 491, 94 Pac. 354, 126 Am. St. Rep. 172.

*Olcese vs. Mobile Fruit etc. Co.*, 112 Ill. App. 281, affirmed 211 Ill. 539, 71 N. E. 1084.

*Baird vs. Pratt*, 6 Ind. Ter. 38, 89 S. W. 648.

*Sutton vs. Risser*, 104 Ia. 631, 74 N. W. 23.

*Bonney vs. Blaidsdell*, 105 Me. 121, 73 Atl. 811.

*Corcoran vs. Henshaw*, 8 Gray, 267.

*Ginn vs. W. C. Clark Coal Co.*, 143 Mich. 84, 106 N. W. 867, 107 N. W. 907.

*Nass vs. Welter*, 92 Minn. 404, 100 N. W. 211.

*Parkins vs. Missouri Pac. R. Co.*, 72 Neb. 831,  
101 N. W. 1013.

*Bryant vs. Thesing*, 46 Neb. 244, 64 N. W. 967.

*Hayden vs. Demets*, 53 N. Y. 426.

*Smith vs. Pettee*, 70 N. Y. 188, 53 N. E. 810.

*Gould vs. Banks*, 8 Wend. 563, 24 Am. Dec. 90.

*Drucklieb vs. Universal Tobacco Co.*, 106  
App. Div. 470, 94 N. Y. S. 777.

*Hess vs. Kaufherr*, 128 App. Div. 526, 112 N.  
Y. S. 832; see also *John vs. Oppenheim*, 55  
N. Y. S. 280.

*Hill vs. Heller*, 27 Hun. 416.

*O'Donohue vs. Leggett*, 55 Hun. 607, 8 N. Y.  
S. 426, affirmed 134 N. Y. 40, 31 N. E. 269.

*Manda vs. Etienne*, 93 App. Div. 609, 87 N.  
Y. S. 588.

*United Fruit Co. vs. Bisese*, 25 Pa. Super.  
Ct. 170.

*Kelley vs. Berry*, 39 Wis. 669.

*Meincke vs. Falk*, 61 Wis. 623, 21 N. W. 785,  
50 Am. Rep. 157.

In the case first cited the purchaser made a number of objections to the work performed by the contractor. Some of which were remedied and others were disputed. After suit had been commenced new objections were made to the work. The Circuit Court of Appeals (2nd) said:

“To permit the purchaser under such circumstances to change the issues and propound new defenses, presumably waived, without offering to show that it had been misled by the conduct of the contractors or that the defect since discovered were latent, would be contrary to well-settled principles of estoppel. *Littlejohn vs. Shaw*, 159 N. Y. 188, 53 N. E. 810; *Railway Co. vs. McCarthy*, 96 U. S. 258, 24 L. Ed. 693; *Carleton vs. Jenks*, 26 C. C. A. 265, 80 Fed. 937; *Davis vs. Wakelee*, 156 U. S. 680-690, 15 Sup. Ct. 555, 39 L. Ed. 578; *Gingrass vs. Iron Cliffs Co.*, 48 Mich. 413, 12 N. W. 633; *Gould vs. Banks*, 8 Wend. 562, 24 Am. Dec. 90; *Manufacturing Co. vs. Allen*, 53 N. Y. 515, 519.

“In *Railway Co. vs. McCarthy*, cited above, Mr. Justice Swayne, speaking for the court, thus stated the principle upon which the ruling of the court below was predicated:

“‘Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun change his ground and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is stopped from doing it by a settled principle of law.’

“*Gould vs. Banks*, 8 Wend. 562, 24 Am. Dec. 90; *Holbrook vs. Wright*, 24 Wend. 169, 35 Am. Dec.



607; *Everett vs. Saltus*, 15 Wend. 474; *Wright vs. Reed*, 3 Term. R. 554; *Duffy vs. O'Donovan*, 46 N. Y. 223; *Winter vs. Coit*, 7 N. Y. 288, 57 Am. Dec. 522.

“In *Littlejohn vs. Shaw*, cited above, the action was upon a contract of sale of gambier. The defendant had rejected the article delivered upon two specific grounds. The contention was that it was a condition precedent to recovery that the plaintiff should affirmatively prove that all the terms of the contract had been fulfilled on his part, and that a failure in any point was fatal to the action. After observing that the general rule was that it devolved upon a plaintiff to show performance of all essential stipulations of a contract sued upon, the New York Court of Appeals said:

“ ‘But in this case the defendants placed their rejection of the gambier upon two specific grounds, viz., that it was not of good merchantable quality, and that it was not in good merchantable condition. By thus formally stating their objections, they must be held to have waived all other objections. *The principle is plain, and needs no argument in support of it, that if a particular objection is taken to the performance, and the party is silent as to all others, they are deemed to be waived.* This waiver of all other objections is not only justly inferable generally, but is especially so when, as under the circumstances present in this case, the deliberateness with which the objections are stated leaves it to be implied and there has been a consideration of the matter of acceptance of the goods and a result reached upon particular grounds. The defendants, therefore, were not in a position to insist upon any other proof of the plaintiffs to enable them to recover upon their right of action, than that the

gambier was of good merchantable quality and in good merchantable condition.' ”

In England the rule is the same.

*Braithwaite vs. Foreign Hardware Company,*  
*supra.*

It appeared that defendants repudiated a contract for the purchase of lumber on the ground that the plaintiff committed a breach of the contract by selling similar lumber to other parties and defendants refused to accept lumber upon this basis. It was held that defendant had waived every right to object to the tender of the lumber on the subsequently discovered ground that a portion of it was of inferior quality.

The Supreme Court of Michigan, in *Ginn et al. vs. Clarke Coal Company*, 143 Mich. 84, 106 N. W. 867, 107 N. W. 904, said:

“Defendant complaint because the trial court excluded certain testimony offered by it for the purpose of proving that the coal rejected was not of a merchantable quality. The trial court had a right to understand that defendant sought to introduce this testimony not for the purpose of reducing damages, but solely for the purpose of justifying its rejection of the coal. As this court reviews upon writs of error only questions raised in the trial court, the question for our determination is: Was this testimony admissible to justify the rejection

of the coal? Defendant, after having a full opportunity to examine the coal, notified plaintiff that they rejected the same for a certain specific ground, viz., the coal was not Pine Grove coal. Plaintiffs had a right to act upon the assumption that this was the only ground upon which defendant relied, and it would be unjust to permit defendant to rely upon other grounds on the trial of this case. This precise question was determined in *Littlejohn vs. Shaw*, 159 N. Y. 189, 53 N. E. 810."

The Supreme Court of Iowa, in *Sutton vs. Risser*, 104 Iowa 631, 74 N. W. 23, said:

"Where a buyer refused to accept goods on account of their quality, he cannot thereafter justify such refusal by alleging a shortage which the seller had offered to correct." (Syllabus.)

In Pennsylvania the court held that a refusal to accept fruit on the ground that it was frozen on arrival was a waiver of objection that the quantity was not that ordered.

*United Fruit Co. vs. Bissese*, 25 Pa. Superior Court, 170.

The Supreme Court of Minnesota, in *Lathrop vs. O'Brien*, 37 Minn. 175, 59 N. W. 413, said:

"It is also undisputed that at the time the deeds were tendered the objection that the patents had not been recorded, and no money tendered to pay for recording them, was neither made nor suggested. Conceding, for the sake of argument, that the tender was insufficient for the reasons stated, yet, the defendant having placed his refusal solely on a certain

other specified objection, is precluded from now raising another objection trifling in its character, and which, if made at the time, could have easily been remedied by plaintiff.

“But, however this may be, upon the facts proved and found defendant must be held to have waived the objections to the tender he urges.”

In *Ricketts vs. Buckstaff*, 90 N. W. 915, the Nebraska court said:

“The defendants now object to some of the tenders on the ground that they were made by check and were not unconditional. No such objection was urged against the tenders when made. They were objected to on the sole ground that under the construction placed upon the contract by the defendants hereinbefore mentioned the amount tendered was insufficient. It is well settled that where a tender is rejected on one ground other objections thereto are waived.”

Again the Nebraska Court said, in *Parkins vs. Missouri Pacific Railway Co.*, 72 Neb. 831, 101 N. W. 1013:

“The defendant, of course, could not during all the time the question of receiving the gravel was pending lead the plaintiff to believe that in the judgment of the superintendent the gravel was suitable by raising other objections and giving other reasons for not receiving it, and, not having at any time notified the plaintiff that the gravel was unsuitable, defend upon that ground when sued. This would be the rule even though the fact were that the gravel was unsuitable for the uses for which the defendant desired it.”



The Court of Appeals of New York, in *Hayden vs. Demets*, 53 N. Y. 426, held that a refusal to accept goods on the ground of inability to pay was a waiver of the objection that the amount was too small.

And in a note to the case of *Bundy vs. Wells et al.*, 88 Neb. 554, 130 N. W. 273, found in Volume 23, *Am. & Eng. Ann. Cases*, on page 903, it is said:

“All the authorities support the rule announced in the reported case that where a tender is refused without objection to the sufficiency of the amount, the objection being based on other grounds, the amount cannot afterwards be questioned.”

Cases are cited from twenty-one states.

“One of the most common ways in which a waiver will be deemed to have been made is by objecting to the tender on a certain specific ground other than that for which it might otherwise have been held sufficient. Thus, where a tender is refused without objection to the sufficiency of the amount, but on other grounds, objections to the amount of the tender will be considered waived. So, a refusal of a tender based on the insufficiency of the amount, or some other objection rather than the medium, waives objection that the tender is not made in a proper manner. So, objection to the time or place of tender are similarly waived by failing to object on these grounds and specifically objecting on other grounds.”

*Elliott on Contracts*, Vol. 3, Sec. 1971, p. 128.

“So, objections on account of the tender of too much, or too little, or at a time or place other than that at which it may have been required to be made, may be waived in the same way or by the failure to object on the grounds of the insufficiency of the tender for such reasons.”

*Elliott on Contracts*, Vol. 3, p. 126, Sec. 1970.

Common honesty among business men and the maintenance of justice in the courts will not permit the parties in their dealings to take one position during the course of their transactions and a different position when the matter comes on for trial before a jury. This principle is clearly established by the decisions set out hereinabove.

According to Polson the shipment was twelve bars short and 2,645 pounds short. It had proved this by four witnesses who had actually handled the steel and had produced the agent of the Northern Pacific Railway Company at Hoquiam to corroborate the same. And so the case stood at the close of the second day of the trial. It is not necessary to comment to the court on the surprise with which Neumeyer and his counsel heard objections to this testimony. But this so-called defense crumbled and reacted upon its defenders when the following morning counsel for Neumeyer, by great effort and

unusual good fortune, were able to secure an admission by telegraph from the agent of the Northern Pacific at Hoquiam, who had testified for defendant the afternoon before, that these twelve bars or 2,645 pounds shortage had actually been received and had actually been taken away by a transfer company. Counsel believed then, and subsequent investigation justifies their belief, that Polson had not only made a sham and fraudulent defense when it pleaded that Shaw was its bookkeeper and not its buyer, and that the order had been taken fraudulently, but also that this company had upon the witness stand continued its fraudulent efforts to rob the plaintiffs of their just verdict, not only to defeat them in their action for the price of this steel, but to take twelve bars and 2,645 pounds scot free without the payment of a single penny. Could any court of justice in the United States, high or low, under the disclosures in this case, grant a motion for a directed verdict if there was any evidence of any kind—however slight and frail—deny the plaintiffs their verdict and judgment, and give to the defendant without charge a considerable portion of this merchandise?

Finally, we believe the question of non-delivery or non-performance because of alleged varia-

tions in quantities was waived and therefore was not an issue. If not an issue, it follows, of course, there is no basis for a motion for a directed verdict, no basis for an assignment of error on the instructions refused; if an issue, then the jury decided the disputed question of fact against defendant under proper instructions.

No error having been committed, and a fair trial having been given to the defendant, the judgment should be affirmed.

Respectfully submitted,

JOHN W. ROBERTS,

NELSON R. ANDERSON,

*Attorneys for Defendant in Error.*



No. 2584

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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POLSON LOGGING COMPANY, a Corporation,  
Plaintiff in Error,

vs.

GUSTAVE H. NEUMEYER and ABRHAM J.  
DIMOND, Copartners Doing Business Under  
the Name and Style of NEUMEYER &  
DIMOND,

Defendants in Error.

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Reply Brief of Plaintiff in Error

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F. D. Monckton,

Clerk.



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Reply Brief of Plaintiff in Error

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I.

In the case of Roehm vs. Horst, 178 U. S. p. 1; 44 Law Ed. p. 953, the Supreme Court of the U. S. quotes with approval the opinion of Cockburn, Chief Justice, in Frost vs. Knight, L. R. 7 Exch. 111, as follows:

“The law with reference to a contract to be performed at a future time, where the party

bound to performance announces prior to the time his intention not to perform it, may be thus stated: The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party, not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as the wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, \* \* \*."

The opinion of Cokburn, Chief Justice, is but a statement of the general law and finds support in all of the decided cases where an action is brought by the seller on the theory of an executed contract.

The cases cited on pages 11 and 12 of our opening brief are in point. See also:

Inman vs. Elk Cotton Mills, 92 S. W., p. 760.  
9 Cyc., p. 637.

North Shore Lumber Co. vs. South Side Lumber Co., 176 Ill. App. 96.

*Pate vs Ralston 51 L.R.A. (2d)*



The cases cited, therefore, by counsel for defendants in error, on pages 40, 41, 42, 43 and 44 of their brief, to the effect that a tender need not be made where it is clear that the same will not be accepted, are not in point. These cases would be in point were this a suit for breach of an executory contract; but defendants in error having elected to sue on the contract itself, not for damages but for the purchase price, it is an essential part of their case to prove that they delivered or tendered a delivery of the goods called for by the contract. This proposition seems so plain that further argument is unnecessary.

Counsel for defendants in error in the oral argument, as well as in their brief, assert that we are making a new defense in this court. Counsel may have failed to appreciate the validity and seriousness of the defense we did make in the District Court, but such fact furnishes no argument in support of the theory that we are now making a new defense. Defendants in error alleged that we gave them and that they accepted from us, a certain order for goods, wares and merchandise, a copy of which was attached to the complaint as Exhibit "A," of the agreed and reasonable value of \$3,895.39, and that they, the said defendants in error, thereafter delivered to plaintiff in error said goods, wares and merchandise in accordance with said order, at Hoquiam, Washington. (Rec. p. 4.) The answer denies each and every allegation, matter, statement and thing of Paragraph 4 of the complaint. (Rec. p. 7.) The plead-

ings, therefore, squarely and clearly put in issue, not only the giving of the order, but also the delivery thereof in accordance with the order. Furthermore, in our opening statement to the jury, a portion of which opposing counsel have quoted in their brief, we said:

“In addition, we will prove to you, or attempt to prove to you, that even assuming that this order was obtained from Mr. Shaw in good faith, that then we are not liable for this steel because the plaintiff himself has not complied with the contract.”

Thereafter, and as a part of our defense, we offered the testimony of Mr. Geo. J. Flurshutz (Rec. p. 31), the testimony of Geo. A. Mills (Rec. p. 58), the testimony of Robt. Gillispie (Rec. p. 53), and Defendant's Exhibits “C”, “D”, “G” and “H” (Rec. pp. 132, 150, 168, 169). Exhibits “C”, “D” and “H” show the results of the work of Mr. Flurshutz and Mr. Mills in a careful examination of this steel. It will be remembered that they actually measured each bar, and the exhibits show the length of each bar. Exhibit “G”, which is the summary prepared by Mr. Gillispie, (Rec. p. 168), shows the number of feet of steel of each kind ordered, the length actually shipped and the difference in length between that ordered and that shipped. Furthermore, Defendant's Exhibit “E” shows the approximate length of each bar of steel.

Can anything be plainer but that we contended and contended strenuously at the trial in the lower court, that each bar of steel, with the exception of the last item on the order, should be twenty feet long, cut in two, and no longer? For opposing counsel now to contend that we are raising a new defense in this court, seems to be rather a confession of ignorance.

At this point we desire to call attention to Defendant's Exhibit "E", (Rec. p. 164), which is supposed to be a copy of the invoice sent by defendants in error to plaintiff in error. The original invoice, being Defendant's Exhibit "F", is shown on page 166 of the Record, and it will be noted that in the copy introduced as Defendant's Exhibit "E", there has been added the approximate weight per foot of each kind of steel shipped, as well as the approximate length of the total number of bars of each particular kind of steel, and the approximate length per bar of each particular kind of steel. The original exhibits are with the Clerk of this Court, and it was stated by the writer of this brief, in the oral argument, that Defendant's Exhibit "E" was prepared for the writer's individual use and that the additions to said original invoice had been placed on the copy after the work of Mr. Flurshutz and Mr. Mills had been completed, and that plaintiff in error never received Defendant's Exhibit "E" from defendants in error. This explanation was made by the writer, with the consent and approval of Mr. Anderson, one

of the counsel for defendants in error, and is made because Mr. Anderson in writing his brief, erroneously assumed that Exhibit "E", containing as it does the approximate weight per foot and the approximate length per bar of the steel shipped, had been sent by defendants in error to plaintiff in error at the time of the shipment of the steel. Counsel for defendants in error refer to Exhibit "E" on pages 5 and 19 of their brief. We hope that it is clear to the court, from this explanation, that the only invoice sent by defendants in error to plaintiff in error, is Defendant's Exhibit "F", (Rec. p. 166), and that neither this invoice nor the bills of lading contain any reference, in any way, to either the length of the bars or to the weight thereof.

Opposing council, on page 20 of their brief, accuse us of taking the answers of Mr. Sulcove from their natural setting, to prove that each bar of steel should be twenty feet long, cut in two. It is true that we did not quote all the testimony of Mr. Sulcove in our opening brief, and we respectfully refer the court to the entire testimony of Mr. Sulcove, on the question of the length of the bars, found on page 20 of the record.

Counsel, to get away from the logic and force of our argument that all of the bars should be twenty feet long, apparently take two different and inconsistent positions. On page 21 of their brief they say:



“The only logical inference to be drawn from the written contract is that all bars twenty feet or more in length should be cut in two, and so they were, etc.”

On page 23 of their brief they say:

“Giving full force and credit to a literal interpretation of this testimony by Sulcove it establishes this: That the dog-hook steel should be ten feet long, or literally twenty feet cut in two. It is limited to dog-hook steel, and has no application to all the other bars of this shipment.”

It seems to us that an unbiased and unprejudiced reading of the testimony of Mr. Sulcove, leads plainly to the conclusion that all of the steel ordered, with the exception of the last items on the order, which were to be eight feet each, should be twenty feet long, cut in two. Mr. Sulcove testified that he obtained all his specifications from the camp, and he was asked: “All of those bars were to be twenty feet long, cut in two?” And he answered, “Yes, sir.”

If the original order will be examined, it will be noted that the words “Bars 20 feet long cut in two” are near the bottom of the order and immediately prior to the last item on the order, where the specification is for eight foot steel. How could the specification as to the twenty foot length apply only to the 25 bars of 1x2 Dog Hook Steel, when the item

with reference to Dog Hook Steel is about in the center of the order and is followed by a large number of other specifications, and the specification as to the length of the bars is at the bottom or nearly so? Furthermore, how can it be said that the order means that all bars over twenty feet long, should be cut in two; if so, why were the bars that were less than twenty feet long, cut in two? These bars of steel had to be of a certain length and the order itself naturally indicates the length of the bars. If the order had not specified any particular length, the defendants in error would not have known what lengths to ship and might have shipped any lengths they saw fit. But the order as given, specifies that all of the steel, with the exception of the last item on the order, should be twenty feet long cut in two. All of the bars of steel which were actually shipped by defendants in error, were cut in two, although the lengths were not as prescribed by the contract. That we are right in our construction, is further borne out by the original invoice, being Defendant's Exhibit "F", (Rec. p. 166), in which it is stated, towards the bottom thereof and before the last two items, the words, "Bars cut in two". If only the Dog Hook Steel should be twenty feet long cut in two, and the other bars of steel should not be cut in two and could be of any length, then defendants in error have actually shipped us double the amount of the other kinds and descriptions of steel ordered.

It is probably technically true that there is no requirement in the contract that each bar of steel

should be cut in exactly equal parts, or, in other words, that each bar cut in two, should be exactly ten feet long. But the contract does say, specifically and clearly, that the original length of each bar should be twenty feet long and that each bar of such length should be cut in two. We can concede, for the sake of the argument, that if defendants in error had actually shipped us bars of steel twenty feet long, cut in two, but that the individual bars so cut in two were not exactly ten feet long, that we would have no complaint to make. However, that does not militate against the force and logic of our position that defendants in error could not ship us bars of steel of any greater length than twenty feet. As shown by Exhibit "E" (Rec. p. 164), or inferentially by the summary shown as Exhibit "G" (Rec. p. 168), the 3 bars of  $1\frac{1}{2} \times 2\frac{1}{2}$  Swivel Steel, shown on the first item of the order, were 25 feet in length, the next bars were 24 feet long, the next bars were 29 feet long, the next bars were 24 feet long, the next bars were 19 feet long, the next bars were 28 feet long, the next bars were 24 feet long, and so on. The two bars of 2 inch Round Piston Rod Steel were each only 15 feet long.

Will anyone contend that this is even a substantial compliance with the contract sued on? If defendants in error had the privilege and right, in the face of the order, to send us bars of steel of the lengths above given, why were they not at liberty to send us bars of steel 35 feet long and cut them

in two, and thereby not only fail in sending us what was actually ordered, but also succeed in swelling the order to that extent?

Opposing counsel state on page 22 of their brief, that there was no evidence to show that the lengths required by the contract were given for the particular purposes of defendant's camp; that the record does not show that the length was at all material. It appears from the testimony of Mr. Sulcove on page 20 of the Record, that he went to camp for the purpose of getting the kinds and sizes of the steel and also the length of the bars, and that he received all his specifications, and more particularly the specifications with reference to length, from Mr. Kline and Mr. Brown, the Superintendent and Head Machinist of the camps. Now the order shows that all of the bars were to be twenty feet long, and this is a matter which is descriptive of the subject matter. The contract itself is conclusive on the question. Oral testimony on the trial, that this was a material part of the contract, would have been entirely inadmissible.

A purchaser ordering goods of a certain kind or description, need not prove why he wanted goods of the kind or description ordered, or how material it was that he have goods of the kind and description ordered. A seller accepting such an order, must fill the order as given and cannot excuse himself for non-delivery by attempting to prove that the goods



shipped to the purchaser satisfied the purchaser's needs as well as the goods which were actually ordered by him.

The specification that these bars of steel should be twenty feet long cut in two, was, as said by the Supreme Court of the U. S. in *Pope vs. Allis*, 29 Law Ed., p. 393, a part of the description of the thing sold which became essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted.

It is a question of what the parties bargained for and whether or not the seller delivered to the purchaser what the latter actually bargained for.

The only testimony upon which opposing counsel rely to prove that the steel shipped complied with the contract, is the testimony of Mr. Neumeyer, when he testified on direct examination, that the goods were shipped exactly in accordance with the order. (Rec. p. 22.) We have already analyzed his testimony in our opening brief and shown that Mr. Neumeyer had no knowledge on the subject whatever. To emphasize our argument, we might call attention to the fact that it was shown on the trial that this steel was shipped in two shipments; that twelve bars of steel were shipped from Seattle on May 12th, 1913. (Rec. pp. 66 & 67; Plff.'s Exh. No. 12, Rec. p. 127.) Mr. Sharp, the agent of the Northern Pacific Railway Company at Hoquiam, who testified for plaintiff in error, evidently had no know-

ledge that this second shipment of steel had any reference to the first shipment whatsoever. Opposing counsel, upon learning that the missing twelve bars had been shipped by a second shipment, immediately sent a telegram to Mr. Sharp, and he immediately answered by saying that the twelve bars had arrived on May 14th and had been delivered to the Hoquiam Livery & Transfer Co. on that day. It will be remembered that the date is May 14th, 1913. Mr. Neumeyer was not in Hoquiam until the fall of that year; so that when he testified that he saw the steel all piled up in the warehouse in Hoquiam, and that the steel was shipped in accordance with the order, it will be seen at a glance, that he was merely testifying on an assumption that his firm had actually filled the order as given. Neumeyer did not miss the twelve bars then and knew nothing of these twelve bars until the evidence on the trial developed that twelve bars were missing, all of which, as is evident from opposing counsel's brief, was the cause of much consternation on their part during the trial of the cause.

## II.

### **THE QUESTION OF SUBSTANTIAL COMPLIANCE.**

Counsel for defendants in error contend that the rule of substantial compliance applies to a contract of this character. They say that the original common law rule required a strict and literal per-

formance as a condition precedent to recovery, but that the modern rule permits recovery upon showing a substantial compliance. This statement is probably correct when applied to building contracts or contracts in general. By the very nature of things, it can have no application to the case of sales, where goods are purchased and sold under a particular description. It is true now, as always, that if I purchase personal property under a particular description, I am not obliged to accept the same unless the goods tendered are according to the description; in other words, I am not obliged to take something that I did not order.

As stated by Lord Blackburne in the case of *Bowes vs. Shand*, cited in our opening brief on page 33:

“If the description of the article tendered is different in any respect, it is not the article bargained for and the other party is not bound to take it.”

If I bargained for 100 bushels of wheat, I am not obliged to accept 99 bushels. If I order 6 pairs of shoes, I am not obliged to accept 5 pairs. If I order bars of steel 20 feet long, I am not obliged to accept bars 29 feet long, 24 feet long, 22 feet long or 15 feet long. A specification as in the case at bar, that bars of steel ordered should be 20 feet long, is descriptive of the subject matter and is to be regarded, as stated by the U. S. Supreme Court in the case of *Norrington vs. Wright*, page 21 of our opening

brief, as a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.

The rule laid down by the U. S. Supreme Court in the case of *Brawley vs. U. S.*, 6 Otto, 168, quoted in our opening brief on page 28, has never been changed and is the law today.

In this connection see also the following cases:

*Hadley Dean Plate Glass Co. vs. Highland Co.*,  
143 Fed. 242.

*Brunswick vs. E. Point Milling Co.*, 74 S. E.  
448 (Ga. 1912.)

*J. A. Ruhl Clothing Co. vs. Swigleton*, 143 S.  
W., 529.

*Greenbrier Lbr. Co. vs. Ward*, 36 W. Va. 573;  
15 S. E. 89.

*Brass Dry Goods Co. vs. Granite City Mfg. Co.*,  
39 S. E., 471.

The Supreme Court of the State of Washington, in the case of *Springfield Shingle Co. vs. Edgecomb Mill Co.*, 52 Wash., 620; 101 Pac. 233, affirms the general rule for which we contend, in the following language:

“But the theory of this case is, that the sale of an article as being of a particular description, does imply a contract that the article sold is of that description, a doctrine that is supported by abundant authority both in this



country and in England; and this rule is founded, not upon any theory of warranty, either express or implied, but rather upon the theory of condition broken; and if the action be one brought by the vendor to recover the price of the article sold, the tender of an article answering the description is a condition precedent to the recovery; and if this condition be not performed, the vendee is entitled to reject the article, or if he has paid for it, to recover back his money."

The case of *Taylor vs. Ewing*, 74 Wash., 214, is not in point, as it has absolutely no application to the sale of personal property by a particular description.

The case of *Woodruff et al vs. Hough*, 91 U. S., 596, involved a building contract, as did also the case of *Pitcairn vs. Phillip Hiss Co.*, 113 Fed., 492.

We admit that in the case of building contracts the rule of substantial compliance applies; but, as before stated, there is a very wide and clear distinction between building contracts and the sale of personal property by a particular description.

The case of building contracts and contracts of a like nature, is a well recognized exception to the general rule, and the reasons for the exception are well stated by the Supreme Court of the State of Wisconsin in the case of *Henry A. Foeller vs. John F. Heintz*, 118 N. W. 543; 24 L. R. A. (N. S.) 327, and note.

See also *Mortimer vs. Dirks*, 57 Wash., 402-404; 107 Pac. 184. \*

The rule laid down in 3 Page on Contracts, Sec. 1385, quoted on page 34 of opposing counsel's brief, has no reference to the subject of sales, but applies to contracts in general.

The only case which learned and industrious counsel for defendants in error have been able to find, which in a measure supports their contention, is the Texas case of *Richardson vs. Herbert*, 135 S. W. 628. The facts of that case, however, are not given, and the court mainly relies upon the case of *Linch vs. Paris Lumber & Grain Elevator Co.*, 80 Tex., 23; 15 S. W., 209, to support the conclusion reached by it. If that case will be examined it will be found that it involves the performance of a building contract. After quoting from this Texas case, the court in the principal case says:

"The opinion in the Texas case was in regard to a charge similar in terms to the one in the case at bar and is supported by the consensus of opinion in the United States."

Cases from Arkansas, California, Iowa, Maine, Minnesota, Michigan, Pennsylvania and Wisconsin are then cited. We have examined all of these cases and we find that they are all cases involving building contracts and not one of the cases has to do with the purchase of personal property of a certain kind and description.

It seems to us that this case, therefore, cannot be considered as an authority. That the case is not

a well considered one is shown further by the following quotation from the opinion:

“A literal compliance such as appellants demand would vitiate the contract if a tie should fall short the hundredth part of an inch in dimension, or if there was an infinitesimal portion more of sap than was specified in the contract.”

The court seems never to have heard of the Latin proverb, “*De minimis non curat lex*,” or, “The law does not concern itself about trifles.”

If the rule is as contended for by counsel, in a case such as the one at bar, it seems strange that with opposing counsel’s known ability and industry, they should not have been able to find a case which supports their position. But assuming, for the sake of the argument, that the doctrine of substantial performance applies to cases of this character, it must necessarily follow that substantial compliance and strict compliance are one and the same as applied to such cases. In other words, in cases of this character, a substantial compliance must be a strict compliance, otherwise a purchaser would have no assurance that he was getting what he bargained for.

But taking opposing counsel’s view of the law on this subject, let us see whether the contract has been even substantially complied with. It must be conceded that the bars of steel ordered were to be 20 feet long. It is shown by the uncontradicted testimony in the case, and more particularly by Defendant’s Exhibit “E”, (Rec. p. 164), that the great ma-

jority of the bars sent were much more than twenty feet long. The first bars of steel shown on the order were 25 feet long, the next bars were 24 feet long, the next 29 feet long, the next 24 feet long, the next 19 feet long, the next 28 feet long, the next 24 feet long, etc. Can it be reasonably contended that when bars 20 feet long are ordered, that it is a substantial compliance with the contract to ship bars of the length above stated? It seems to us that the question carries with it its own answer. We can put it another way, by saying that there were shipped 523 feet of steel more than was ordered, which made into bars 20 feet long, makes a total of more than twenty-six bars or about 15 per cent more than the order calls for, (R. p. 49).

This does not take into account the excess length of the twelve bars shipped in May, of which we have no record. By referring to the order it will be noted that there were ordered seven bars of  $1\frac{1}{4} \times 4\frac{1}{2}$  Round Choker Hook Steel. Only two bars, or one bar cut in two, were actually shipped in the first shipment, leaving twelve bars, or six bars cut in two, which were shipped in May. By referring to Defendant's Exhibit "G" it will be noted that the one bar cut in two shipped in the first shipment, had an excess length of 5 feet  $5\frac{3}{4}$  inches and an excess weight of 106 pounds. We have a right to assume that the bars shipped in May were substantially like those shipped in the first shipment, so that we have 30 feet additional excess length and 936 pounds excess weight. The 523 feet, which does not include the



the 30 feet excess length of the May shipment, had a total weight of 2709 pounds. The total weight of the entire shipment, including both shipments as shown by the invoice, (Deft.'s Exh. "F"; Rec. p. 166), amounts to 30,910 pounds. For our figures to be correct, we should deduct from this the excess weight of the twelve bars of steel shipped in May, because we are not taking in account the excess length of that shipment. This makes the actual weight of the goods actually shipped in the first shipment, approximately 30,000 pounds. The 523 feet had a total weight of 2709 pounds. Taking the difference, we find that the shipment should not have weighed more than 27,291 pounds, so that the percentage of overweight is 10 per cent. Figuring the matter in dollars and cents, if we add the 936 pounds overweight in the May shipment, to the 2709 pounds overweight in the first shipment, we would have a total overweight of 3645 pounds, which at 12½ cents a pound, amounts to \$455.62. This is considerably more than 10 per cent of the entire purchase price. In our opening brief, on page 19, we gave the figures as \$338.62, but we did not take into account the excess weight in the May shipment. Even if we look at the case from the standpoint of an ordinary building contract, or contracts of a like character, and of the rule of law applicable to the performance of such contracts, we find that the authorities would not sustain the contention that the contract had been even substantially complied with.

As shown by the authorities in our opening brief, this is not a defense *pro tanto*, but it is a matter that inheres in the very nature of the contract and is a complete defense to the action.

## III.

**THE QUESTION OF WAIVER.**

It will be well, in the discussion of this question, to advert to a few facts. The order was given in September, 1912. Plaintiff in error testified that no acknowledgment of receipt of the order was sent by defendants in error to them. Plaintiff in error received the invoice, being Defendant's Exhibit "F" (Rec. p. 166) about February 17th, 1913. Mr. Robt. Polson, the manager of plaintiff in error, testified that the first he heard of the order or claimed order, was in February, 1913, when the invoice was received at the office; that he looked over the order and found it so strange that he looked through all the office records to find if there was any copy or any record of any such order, and he found none; that he questioned Mr. Shaw about the order and Mr. Shaw stated that he had given no such order; that witness has general charge of the camps and is a practical logger, having been in the business since 1894, and that his company at no time ever purchased even a quarter of a carload of steel, but purchased only a few bars at a time; that they have a warehouse in the back of their office at Hoquiam, in which they keep the tool steel, and this supply is always kept up by buying a few bars at a time; that the quantity of steel shown on the order is sufficient to last the company for a good many years to come. (Rec. pp. 64 & 65.) Mr. Alexander Polson, the president of plaintiff in error, testified substantially

as his brother, Mr. Robt. Polson, and testified further that the first his company learned of any discrepancy in the kind, character and description of the steel sent, with that specified in the order, was shortly before the trial and after Mr. Mills and Mr. Flurshutz had measured and weighed the same. The order was rejected on February 19th. After receipt of the invoice quite a number of telegrams and letters passed between plaintiff in error and defendants in error. The first telegram was sent by the Polson Logging Company on February 18th, in which they acknowledge receipt of the invoice for the steel and state there must be some mistake. (Plff.'s Exh. No. 2; Rec. p. 116.) Again on February 19th the Polson Logging Company wired defendants in error that there was no record of the order in the office and that they must prove that the order is not a forgery or obtained by fraud; that they would not accept the order. (Plff.'s Exh. No. 7; Rec. p. 121.) The defendants in error were again notified that the shipment would not be accepted by Plaintiff's Exhibit No. 3; Record p. 117; again by Plaintiff's Exhibit No. 4, which is a letter dated March 22nd, Record p. 118. As shown by Defendant's Exhibit "I", the steel actually arrived on March 11th, 1913, and after the passing of the letters and telegrams above referred to. (Rec. p. 183.) When the steel arrived it was refused on account "not ordered". (Deft.'s Exh. "A"; Rec. p. 131.) It will be noted, as stated in our opening brief, that the invoice and the bills of lading only show the number of bars shipped,

and the invoice, in addition, show the weights, not of each particular bar of steel, but the total weight of each kind of steel shipped; but they are silent as to the length of the bars. Plaintiff in error had no information whatsoever with reference to the lengths until shortly before the trial and while they were preparing for the defense of the case. It will be noted also, in this connection, that the shipment was refused because it was claimed that the order never was given, and this defense also was continued throughout the trial in the lower court. Opposing counsel say on page 7 of their brief, and Mr. Anderson also argued before this court on the oral argument, that the steel was refused because the sizes were not correct. There is no such testimony in the record. The only reference to sizes is in a letter from the Polson Logging Co. to the defendants in error in which they refer to a number of sizes shown on the order, saying that they were sizes never used by them in their camps, and that such fact would be sufficient to the mind of any reasonable person, that the order had never been given. This reference to sizes was merely referred to as an argument to show that the steel had actually never been ordered by them. (Deft.'s Exh. "J"; Rec. p. 184.)

Upon these facts the question arises as to whether or not we are now estopped from taking the position that defendants in error have not complied with their contract.

In discussing this question, it first occurs to us,



that defendants in error, suing, as they do, on an executed contract, must prove a compliance therewith, or a waiver on the part of the buyer to a performance on their part of certain terms of the contract. If defendants in error rely upon a waiver, it would have been necessary for them to set up in their complaint, that performance of the contract in certain particulars had been waived and submit proof of this allegation. This has not been done.

A leading case on the question of waiver, is the case of *List & Sons Co. vs. Chase*, found in Vol. 80 of *Ohio St. Rep.* on page 42, decided on March 9th, 1909; also found in *A. & E. Ann Cases*, Vol. 17, p. 61. The plaintiff in that case brought suit to recover for the defendant's failure to accept a shipment of eggs, which plaintiff claims the latter had ordered. The plaintiff alleges a performance of all the conditions of sale on his part. The answer was first a general denial, and then an affirmative defense setting up what the contract was, and alleged breach thereof, in that the goods were not shipped on time; that the eggs were not fresh; that the defendant refused to accept them upon arrival, etc. The court said that the burden of proof remained with the plaintiff to prove the contract and the performance thereof. It appears that the lower court swept aside all questions as to the quantity purchased and as to the route by which the eggs were to be shipped. With reference to this point the court says:

“A waiver is a voluntary relinquishment of a known right. It may be made by express

words or by conduct which renders impossible a performance by the other party, or which seems to dispense with complete performance at a time when the obligor might fully perform. Mere silence will not amount to waiver where one is not bound to speak. \* \* \* It is true that if the contract bound the plaintiff to ship by such a route, the defendant might have rescinded the contract on receiving the bill of lading showing a shipment on another and more hazardous route; but he was not bound to do so then. He might wait until inspection, because inspection might show that the goods were not damaged, and he could then accept them, or if damaged, reject them. The same was true as to the quantity of eggs purchased. The purchaser was at liberty to accept all the eggs shipped to it, although in excess of the amount which it agreed to buy, or it might have accepted out of the excess shipment, the quantity which it agreed to buy; but it was not bound to do either (Mechem on Sales, Sec. 1157-1161) and when it rejected the whole shipment it did not put the plaintiff in any worse position, for upon the hypothesis that the contract was as defendant claims, the plaintiff had already failed to perform his part of the contract."

It was claimed that because the defendant had sent to the plaintiff a telegram assigning only one reason for refusal to accept the same, to-wit: "That the eggs did not stand inspection", it waived all other grounds. The court said:

"We do not deny that under some circumstances a refusal to accept goods for a stated reason, may operate as a waiver of other objections, which might have been properly made. This may be so in cases where the silence of the purchaser and his conduct operate to mislead

the seller and prevent him from protecting himself; in other words, where the contract of the buyer would raise an estoppel against him. See *Johnson vs. Oppenheim*, 55 N. Y., 280-291; *Smith vs. Pattee*, 70 N. Y., 16 & 17. But when the buyer has absolutely rejected the goods for whatever reason, his silence as to other objections which would justify his refusal to accept, when unaccompanied by conduct which may have misled and prejudiced the vendor, cannot be construed as a waiver of the buyer's right to insist on his plea of non-performance on those grounds. The reason which underlies this proposition is, that a waiver must be voluntary, that is, intentional, with knowledge of the facts and of the party's rights, or it must be implied from conduct which amounts to estoppel. Therefore since it does not appear in this case that the defendant when it notified the plaintiff that it refused to accept the eggs for inferior quality, intended to waive objections as to quantity and change of route, or that the failure to notify plaintiff of those objections in any material way, misled or prejudiced the plaintiff, a waiver of such objections cannot be implied.

“Moreover the plaintiff stands upon his averment that he has performed all the conditions precedent on his part. If he would show a waiver of conditions he must aver it as an excuse for non-performance of such conditions. *Eureka Insurance Co. vs. Baldwin*, 57 N. E. 57.”

There are many cases cited in the note to the above case, all of which cases counsel has reprinted in his brief, and which are shown on pages 46, 47, 48 and 49 thereof. All of these cases hold that where a purchaser refuses to accept goods and bases his refusal on a particular ground, he thereby waives

other objections which he might have urged for such refusal; but in all those cases it was apparent that the purchaser had examined the goods and was fully acquainted with the breach on the seller's part, of the contract, and only rescinded the contract on stated grounds.

The court lays down this important exception to the general rule, as follows:

“The general rule is subject to the important exception that the purchaser by asserting a particular ground of objection is not deemed to waive objections of which he has no knowledge at the time of his refusal to accept the goods.”

See: *Kalamazoo Corset Co. vs. Simon*, 129 Fed. 144.

*Tascott vs. Rosenthal*, 10 Ill. App., 639.

*Newberry vs. Furnival*, 56 N. Y., 638.

*Brown vs. Bard*, 118 N. Y. Supp., 371; 64. Misc. 249.

*Perry vs. Mt. Hope Iron Co.*, 16 R. I. 318; 51 Atl. 87.

The syllabus of the latter case reads as follows:

“Where the buyer refused to accept on the sole ground that the goods were shipped too late and received the invoice showing grounds of refusal, he did not waive such other grounds by basing his refusal on the ground first stated.”



In the case of Tascott vs. Rosenthal, *supra*, the court said:

“But it is insisted by appellees that appellants waived their rights to object to premature shipment, by placing their subsequent refusal to accept on the ground that the brushes did not seasonably arrive. We are unable to coincide in this view. By shipping the goods before the time agreed upon appellees committed a breach of their contract and such breach was not occasioned by any act or omission on the part of appellants. Appellees at the time of the breach were not misled by any supposed waiver of the condition in relation to the time of shipment, and because appellants subsequently, under an erroneous belief that the delay in the arrival of the goods was caused by a failure to ship them in time, complained that they had not arrived in season, and assigned that as a reason for refusing to accept them, it by no means follows that this constituted a waiver. And even had appellants known all the facts it would not alter the case for the portion of the condition of the contract in respect to the time of shipment was already completed, and appellees could maintain no action on the contract whatever reasons appellants might thereafter assign for refusing to accept the goods, or though they should assign no reason.” 7 Ad. & E. 650.

In the case of Bryant vs. Thesing (Nebr.), 64 N. W. 967, it appeared that defendant had not refused to take the nursery stock because the trees were not budded, but assigned as a reason for his refusal to receive it, his discharge by a subsequent oral agreement. The court, after stating the rule to be that plaintiff “was obliged to prove a compliance

of the contract on his part and a sufficient tender of the nursery stock ordered, said:

“It appears from the evidence that the defendant did not refuse to receive the stock because not of the kind ordered; but when the jury had determined from the evidence that the trees were not of the kind ordered, as they must have done before they could conclude, as they were informed, that defendant had a right to refuse the stock, the defendant would be entitled to a finding in his favor for the failure of the plaintiff to deliver or tender that which was ordered.”

See also the case of *J. A. Coats & Sons vs. Huffine* (Ind.) 41 N. E., 465, which was a much stronger case for the plaintiff than the case at bar, but where the defense was allowed.

The case of *Nelson vs. Imperial Trading Co.*, 69 Wash., 442-446; 125 Pac. 777, seems to be decisive of the question. That case involved the delivery of a quantity of turkeys. The principle of waiver was discussed, and the court quoted with approval the rule as laid down in 40 Cyc., 261-263, as follows:

“The question of waiver is mainly a question of intention, which lies at the foundation of the doctrine. Waiver must be manifested in some unequivocal manner, and to operate as such it must in all cases be intentional. There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other and is estopped thereby. \* \* \* Mere silence at a time when there is no occasion to speak is not a waiver, nor evidence from which waiver may be inferred; especially where such silence is unaccompanied by any act calculated to mislead.”

Applying the rule laid down by the Supreme Court of the State of Washington, to the case at bar, wherein have we any facts to support a waiver? There is nothing in the record which discloses any intention on the part of plaintiff in error to waive the discrepancies in the lengths of the bars. The steel was not examined and the facts with reference to the kind of goods shipped, were not learned until a week or such a matter before the trial of the cause. The allegation in plaintiffs' complaint that they had delivered goods of the kind, character and description called for by the contract and in accordance with the contract, was expressly denied. The question of the length of the bars, after the order was given, was never the subject of conversation or correspondence between the parties, and there is not a scintilla of evidence in the record, or elsewhere, that defendants in error were misled in any way, shape or manner. On the contrary, defendants in error have always taken the position, and now take the position, that they have complied with their contract. Furthermore, plaintiff in error could not waive something of which it had no knowledge, and a waiver is a voluntary relinquishment of a known right. We can probably make ourselves clear by an illustration: The contract provides that the goods should be shipped f. o. b. Hoquiam. The freight bill shows that the freight on the shipment from Seattle to Aberdeen, was not paid. This was a matter that probably was apparent to plaintiff in error at the time of the arrival of the goods in Hoquiam. It

would probably be true that we could not now defend on the ground that the freight had not been paid.

The case of Peterson Bros. vs. Mineral King Fruit Co. (Cal.) 74 Pac., p. 163, is typical of the cases which are cited by counsel for defendants in error. That was a case of the sale and purchase of certain prunes. At the time the prunes were tendered they were refused upon the ground that the prunes were not sound and merchantable and of the kind ordered and were not properly cured, but no objection was made as to the time, place and manner of delivery. It was rightfully held that these last objections had been waived because the purchaser must have had knowledge of these facts at the time he made his objection to the prunes tendered.

So also in the case of Ginn et al vs. Clark Coal Co., 143 Mich., p. 84; 106 N. W. 867; 107 N. W. 904. The defendant in that case made a full examination of the coal over which the litigation arose and notified plaintiffs that they rejected the same for a certain specific ground, namely: the coal was not Pine Grove coal. It was therefore held that the defendant was not in a position at the trial to rely upon the defense that the coal was not of a merchantable quality.

The same condition existed in the case of Littlejohn vs. Shaw, 159 N. Y. 188; 53 N. E. 810.



In all those cases the defendant had actual knowledge of the failure on the part of the plaintiff to comply with his contract in certain particulars, and based his refusal to accept the goods tendered upon a specific ground or grounds, and it was held, therefore, that the defendant had waived all other grounds of which he had knowledge. These cases can be widely distinguished from the case at bar.

Counsel argued before this court, that we should have gone to the freight depot and examined these goods, and then notified defendants in error of their failure to perform the contract. In other words, he argues that we should have known of the defendants' failure to perform their contract. This argument is not reasonable. Long before the goods actually arrived in Hoquiam, the plaintiff in error took the position that defendants in error had no valid order for these goods, and plaintiff in error, in good faith, maintained this position at all times and throughout the trial in the lower court. That defense is not urged in this court for the simple reason that we feel, as stated in our opening brief, that the question of fraud had been properly submitted to the jury and that the jury had found against us on this issue. Having taken the position that the goods were not ordered, it certainly would be illogical, not to say unreasonable, to expect plaintiff in error to examine the goods when they arrived in Hoquiam and then notify defendants in error that the goods did not comply with the contract. The law will not require such an absurdity. Defendants

in error were not misled by anything that was said or done by plaintiff in error. They kept the contract alive for the benefit of both parties and contented themselves to stand upon the ground that they had completed their contract and were therefore entitled to recover. There is no absolute duty of inspection that devolves upon a purchaser, as the purchaser can either reject or accept the goods without inspection and without assigning any reason therefor. It follows, therefore, that the defendant might have rejected the goods when they came here, without inspecting the same and without assigning any reason for the rejection, and on suit brought could prove on the trial that the goods were not according to the contract. In the case at bar, the goods themselves were not rejected for any specific reason that attached to the goods. The shipment was rejected because it was claimed that the goods were not ordered. If a purchaser does not reject goods shipped him, within a reasonable time after arrival, he is conclusively presumed to have accepted the same, and if the goods are not according to contract, the purchaser can only recoup in damages in an action for the price. So in this case, the steel was absolutely rejected before arrival, upon the ground that the same was not ordered. Inspection on arrival was neither necessary nor proper under the circumstances, and plaintiff in error, having no knowledge of any failure on the seller's part to perform his contract, could not waive the same. Defendants in error had the opportunity on the trial of the case in the lower

court, to show, if they could, that they were misled by any action that plaintiff in error may have taken or failed to take, but this they did not do. On the contrary, they have always insisted and now insist, that they have fully complied with their contract. If, therefore, the question of waiver is based on the equitable ground of estoppel, wherein can it be claimed that the plaintiff in error has waived any rights?

### **CONCLUSION.**

In concluding, we desire to take exception to the statements made in the brief of opposing counsel on pages 54 and 55. Counsel intimates that we knew all the time that the twelve bars of steel which had been shipped from Seattle at a subsequent shipment, had been so shipped, and that we attempted to deceive both court and jury with reference to this matter. The Polson Logging Company is a large concern and has operated in the City of Hoquiam in the State of Washington, for a good many years, and there is no more reputable concern on the Pacific Coast or elsewhere. Mr. Polson testified that he had absolutely no knowledge of this second shipment of steel and that the first that he heard of it, was when it was testified to in rebuttal. Even Mr. Sharp, the agent for the Northern Pacific, had no knowledge that this second shipment had anything to do with the first shipment, as this second shipment was immediately delivered to the Hoquiam Livery & Transfer Co.

Counsel further intimates that we have taken these twelve bars of steel without paying therefor. There is no testimony in the record that we have these bars of steel, and we say with all the earnestness at our command, that these bars of steel were not received by us and we have absolutely no knowledge thereof. Counsel's insinuations are entirely uncalled for and unjust and we believe that if opposing counsel, for whom we have the greatest respect, both for their ability and integrity, had given the matter a second thought, they would not have made these insinuations, or attempted to grasp at something which is entirely outside of the record.

We believe that our position is right and that the case should be reversed.

T. B. BRUENER & J. B. BRIDGES,  
Attorneys for Plaintiff in Error.



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IN THE UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

POLSON LOGGING COMPANY, a  
corporation,

*Plaintiff in Error,*

*vs.*

GUSTAVE H. NEUMEYER and  
ABRAHAM J. DIMOND, co-part-  
ners doing business under the name  
and style of NEUMEYER & DIMOND,

*Defendants in Error.*

No. 2584.

UPON REVIEW FROM THE UNITED STATES  
DISTRICT COURT, FOR THE WESTERN  
DISTRICT OF WASHINGTON,  
NORTHERN DIVISION.

SUPPLEMENTAL AUTHORITIES BY  
DEFENDANT IN ERROR.

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DEFENDANT IN ERROR.

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Defendant in error having had no opportunity  
to answer the reply brief at the oral argument  
owing to the neglect of plaintiff in error in filing  
its opening brief, on April 30, 1915, less than two

weeks of the oral argument, we respectfully pray the court to consider this short supplemental citation of authorities.

We do not controvert the soundness of *Rhoehm vs. Horst*, 178 U. S. 1, or *Frost vs. Knight*, L. R. 7 Exch. 111, but these cases refer to anticipatory breaches of executory contracts and throw no light upon the law of executed contracts. The contract has undoubtedly been kept alive by Neumeyer & Diamond, but the condition precedent has been waived. This distinction between executory and executed contracts is made perfectly clear by Judge Hand in *Lorraine Mfg. Company vs. Oshinsky, et al.*, 182 Fed. 407 (1910).

The court said :

“The second point is as to waiver, and it is based upon the general proposition that the defendant cannot, by his waiver of a condition precedent, subject himself to liability which he did not originally accept. Thus, if here the obligation was to pay for 231, that was the only undertaking, and to hold the defendants liable for the delivery of 222 pieces is to impose upon them a liability to which they have never agreed. *The objection is formally perfect, and substantially idle.* In the first place, there was held only an implied condition, and nothing is more common than to hold liable promissors, who have waived conditions precedent, *without proof of performance by the promisee.* The rule



is of general application (*Littlejohn vs. Shaw*, 159 N. Y. 188; 53 N. E. 810; *Oakland Sugar Mill Co. vs. Wolf Co.*, 118 Fed. 239; 55 C. C. A. 93), and upon it depends the right of the seller to sue for the price after acceptance without proof that the goods were free from defect.

“The same rule applies to a shortage in delivery. *Pittsburgh Plate Glass Co. vs. Kerlin Bros. Co.*, 122 Fed. 414; 58 C. C. A. 648; *Braley vs. Casity*, 145 N. Y. 171; 39 N. E. 814. The defendants had *ample opportunity* to know the shortage. They had the goods and the invoice. They made no objection on that score and they waived the rights, and it makes not a particle of difference that their choice of that particular time to do so might be through selfish or repulsive to the more generous instincts of merchants; but they were nevertheless subject to the rules of just conduct which the law applies to such situations, and I cannot see that even this afterthought of their ingenious counsel avails them under the facts of the case.”

That repudiation of the contract is a waiver of conditions precedent is sustained by three cases in point:

*Braithewatie vs. Foreign Hardware Company*, 2 K. B. 543;

*Zeimantz vs. Blake*, 39 Wash. 6; 80 Pac. 822.

*Linger vs. Wilson*, 80 S. E. 1108 (West Va. 1914).

An exactly similar situation came before the Supreme Court of Appeals of West Virginia in 1914, in *Linger, et al., vs. Wilson*, 80 S. E. 1108.

The court:

“And it is quite apparent in the case that the matter of quantity was a remote and secondary condition by defendant. He deliberately stated a single objection to receiving the shipment. That single objection was the alleged failure of plaintiffs to comply with a former contract. He expressed a willingness, however, to take the full shipment if his claim made under the alleged former contract was considered in settlement. Thus he inferentially waived objection to the excess of quantity. ‘A rejection placed upon one ground may operate as a waiver of objection based upon other grounds.’ 24 Amer. & Eng. Enc. Law, 1092; Benjamin on Sales (7th Amer. Ed.), page 738. The character of defendant’s objection, and the condition embraced therein, so operated in this case. ‘When the refusal to accept purchased goods is based upon particular objections, formally and deliberately stated, all other objections are deemed waived.’ *Littlejohn vs. Shaw*, 159 N. Y. 188; 53 N. E. 810. An excerpt from the opinion in the case cited is applicable to the case under consideration: ‘This waiver of all other objections is not only justly inferable, generally; but is especially so, when, as under the circumstances presented in this case, the deliberateness with which the objections are stated leaves it to be implied that there has been a consideration of the matter of the acceptance of the goods and a result reached upon particular grounds.’

“Moreover, defendant persisted in a baseless objection until a reasonable time had expired for objecting on the ground of an excess of quantity. Though a purchaser of goods does not order the quantity delivered to him, a sale of the whole will be implied where on receiving the goods the purchaser does not within a reasonable time repeal the implication by returning the goods or notifying the seller that he will not accept the goods or notifying the seller that he will not accept them because of the excess of quantity. Failure to return, or to give notice of nonacceptance, amounts to an acceptance. *Bartholomae vs. Paull*, 18 W. Va. 771; *Thompson vs. Douglass*, 35 W. Va. 337; 13 S. E. 1015; *Ford vs. Friedman*, 40 W. Va., 177; 20 S. E. 930. In reason, and in justice to plaintiffs’ rights, defendant could not delay so long as he did and then rely on an objection to the quantity. *He impliedly accepted the full quantity, subject only to the baseless objection to which we have referred.* Indeed, his letters of objection to plaintiffs plainly show that he had no objection to the quantity if he could have the alleged breach of a former contract taken into consideration in settlement.”

The rule is universal throughout the United States that every buyer has the right to inspect or the opportunity to inspect merchandise upon delivery. Equally universal is the rule that the buyer must make his inspection within a reasonable time else he shall be conclusively presumed to have ac-

cepted. By logic every right imposes a correlative duty. By law the right given the buyer to inspect imposes the duty upon the buyer to the seller that he inspect and either accept or refuse.

*Benjamin on Sales*, 666 (Bennett Ed.; 1888).

*Mechem on Sales*, Secs. 1363, *et seq.*

9 *Cyc.*, 647.

*Buick Motor Car Co. vs. Reid Mfg. Co.*, 113 N. W. 591 (Mich.).

*Western Construction Co. vs. Romona Oolitic*, 80 N. E. 856 (Ind.).

*Motley Green & Co. vs. Elmerhorst*, 127 N. Y. Sup. 625.

*Eaton vs. Blackburn, et al.*, 5 Oregon, 300; 16 Am. & Eng. Ann. Cases 1198.

*Day Leather Company vs. American Leather Co.*, 104 N. W. 797.

*Mason vs. Smith*, 130 N. Y. 480; 29 N. E. 949.

*Grenfelder vs. Vosburgh*, 85 N. Y. Sup. 1048.

*Druckleib vs. Universal Tobacco Co.*, 94 N. Y. Sup. 777.

Failure to inspect is approval.

*Fraser vs. Ross*, 41 Atl. 204 (Delaware, 1898).

Plaintiff was mislead:

1. Assumed the shipment was objected to because of forgery, fraud and want of authority only.



2. Assumed the quantities were correct and satisfactory because no objection was made. Had the right to assume as much under the authorities.

3. Deprived of the opportunity to show that the kind of steel ordered is by nature inexact and runs in "approximate" lengths and was so understood by the parties.

4. Deprived of the opportunity to show conclusively and absolutely the delivery, receipt and consumption by Polson of twelve bars of steel and hence *Polson's absolute liability under Meyer vs. Everett Pulp & Paper Co.*, 183 Fed. 857 (C. C. A. 9th).

Do we understand counsel for Polson to contend that a buyer may by baseless and false objections refuse a shipment actually delivered as provided in the contract for two years, then upon the trial saying nothing in his opening statement, nor breathing the defense from his own lips, or from the lips of witnesses upon the stand, only announcing his contention in his argument to the jury that the bars were of excessive length and not in compliance with the contract, still contend that such conduct and course of dealing bears any of the earmarks of fair dealing or of justice? That his silent acqui-

escence has deceived and misled no one? That the notice of defects given and the opinion of Judge Lusk in *Oakland Sugar Mill Co. vs. Fred W. Wolfe Co.*, *supra*, and the pleadings in *Patrick vs. Norfolk Lumber Co.*, *supra*, were irrelevant and immaterial?

#### SUBSTANTIAL COMPLIANCE.

Steel (20 ft. lengths).....	28,804 pounds
Steel Shipped .....	30,910 pounds
Over Shipment .....	2,106 pounds
Or 7.3%.	

Respectfully submitted,

JOHN W. ROBERTS,  
NELSON R. ANDERSON.



